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Supreme Court of the United States

October Term, 1975

No. 75-4921

EDMUND A. ROSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BLEED THROUGH

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No. .....

EDMUND A. ROSNER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming an order of the District Court denying petitioner Rosner's motion for a new trial is reported at 516 F.2d 269 and is set out in the Appendix, infra, at pp. 28a-62a. The opinion of the District Court (Bauman, D.J.) denying Rosner's motion for a new trial, is unreported, and appears in the Appendix at 1a-27a. The order of the Court of Appeals denying the petition for rehearing or rehearing en banc appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 29, 1975. A timely petition for rehearing or rehearing en banc was denied on August 6, 1975.

An extension of time to file this petition for certiorari was granted by Mr. Justice Rehnquist on August 28, 1975, and the time for filing this petition extended from September 5, 1975 to September 29, 1975. This petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether a showing of "ultimate prejudice" is required as a condition of granting relief where A) the United States Attorney's Office deliberately withheld from the District Court, pending a motion for a new trial, critical information of unquestioned relevance to that motion; and B) the United States Attorney's Office deliberately withheld from this Court, pending a petition for a writ of certiorari, significant information which could have affected the outcome of the petition.

(2) Whether the Second Circuit applied the correct standard in ruling that where A) the government's principal witness has committed massive and flagrant perjury about his own criminal background and vulnerability; and B) the responsible government attorneys negligently suppressed evidence of that background before trial and neglected to correct the perjury during the trial, a new trial may not be granted unless the defendant has satisfied the burden of proving that "the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction."

Constitutional Provision and Statute Involved

This case involves the due process clause of the Fifth Amendment to the United States Constitution and the Jencks Act, 71 Stat. 595, specifically, 18 U.S.C. § 3500.

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Introductory Statement

This is a case uniquely suited for Supreme Court review. It is the first case—to petitioner's knowledge—in which a substantiated claim has been presented that a United States Attorney's Office deliberately withheld relevant information from *this very Court* during the pendency of a previous certiorari petition.*

The facts giving rise to this issue are not in dispute. While the first petition for certiorari was pending, Assistant United States Attorney Elliot Sagor—the prosecutor in charge of this case—made three critical discoveries:

1) that the government's "principal" witness, undercover agent and police officer Robert Leuci, had committed "flagrant perjury" at trial, concerning the extent of his own criminal history;

2) that *prior* to trial Leuci had admitted to the Assistant United States Attorney with "primary responsibility" for the disclosure of 3500 material in this case, his participation in a burglary and theft, and that this admission had been incorporated into a written memorandum (called the "Goe" memo) which was, from then on, kept in a government file;

3) that *prior* to trial, the other Assistant United States Attorney who shared responsibility for disclosure of 3500 material, possessed a tape recording of Leuci and one of his informants discussing "procedures whereby [the informant] would obtain" heroin for his own use and for sale.

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* In June 1974, this Court denied certiorari without prejudice to the District Court's consideration of a then-pending new trial motion.

Sagor knew when he made these three discoveries that in his trial testimony Leuci had denied any involvement in the kinds of crimes mentioned in the Goe memo and the Leuci-Lawrence tape; he also knew that despite repeated requests by the defense for information about Leuci's past, neither of the Assistant United States Attorneys in charge of the 3500 material had informed the defense about the Goe memo or the tape and that neither of them had corrected Leuci's perjurious denials of crime at trial. Moreover, Sagor "realized right away that the Goe memorandum, if true, and if in the government's possession [pretrial] and known to the government at the time, was a document which should have been turned over to defense counsel at the time of trial." (H. Tr. 593).*

Despite this realization, Sagor deliberately declined to inform the Solicitor General's Office and this Court of the government's pre-trial knowledge. Although he did notify the Solicitor General that Leuci had committed perjury at trial, he chose to conceal the fact that the two Assistant United States Attorneys responsible for gathering and disclosing 3500 material knew before trial of the existence of the Goe memo and Leuci-Lawrence tape. Indeed, the record establishes that Sagor made certain handwritten changes in a draft of the Solicitor General's brief opposing certiorari which plainly suggested that the Government had *no* pre-trial knowledge of "Leuci's additional criminal conduct..." (H. Tr. 812). Accordingly, when this Court decided to deny certiorari without prejudice, it did so on incomplete information; indeed it did so on information which was *directly contrary* to facts then known to various members of the United States Attorney's Office of the Southern District of New York.

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* "H. Tr." refers to the transcript of the hearing of the instant new trial motion.

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Petitioner first learned of Sagor's deception after this Court had denied certiorari. At the hearing on the instant new trial motion, petitioner raised this issue as a separate occurence of misconduct independently requiring a new trial. An extensive factual record was made concerning Sagor's actions and state of mind during the pendency of the original certiorari petition and he admitted virtually all of the allegations on the witness stand. The Court of Appeals concluded, however, that "Assuming [petitioner's allegations] to be true" they do not require a new trial since appellant's counsel has . . . been unable to demonstrate any ultimate prejudice to appellant by the government's alleged misconduct" pending certiorari. Similarly, the District Court had concluded that prejudice was "beside the point," since it assumed that the Supreme Court, by its decision to deny certiorari without prejudice, had "deferred consideration of all claims arising out of this motion" until it has "another opportunity to pass on Rosner's contentions."

This issue then—concerning the misbehavior of the United States Attorney's Office before this very Court—is one which the lower court recognized to be uniquely appropriate for Supreme Court review. As Chief Justice Burger observed in a related context: "This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of *any* development which *may conceivably affect the outcome*." *Fusari* v. *Steinberg*, 95 S. Ct. 533, 540 (1975) (Emphasis added.). The United States Attorney's Office clearly violated that continuing duty in this case. Recently, the Seventh Circuit in reversing a conviction because the government had suppressed an important fact pending appeal, "long after the pressures of trial were past," observed similarly that "this court is entitled to expect candor from attorney's representing the United States." United States v. Ott, 489 F.2d 872, 874 (7th Cir. 1973). In this case, too,

the failure of the government to fulfill its duty to apprise this Court of critical developments which "may conceivably affect [the] outcome" certainly requires the attention of this Court.

Nor was the government's lack of candor before this Court its only misconduct in this case. As the Court of Appeals found, each phase of the case has been marked by some species of governmental misconduct: pre-trial, the government withheld *Brady* material; during trial, the government withheld 3500 material and failed to correct its chief witnesses' "flagrant" and massive perjury (17a),* post-trial, the government "erred seriously in failing to notify the defense" and District Court of a witness who had come forward with critical information (57a). Indeed, the only reason the Court of Appeals declined to order a new trial was its conclusion that petitioner had failed to satisfy his burden of establishing that he was sufficiently prejudiced by any of the government's acts of suppression, in that he has been "unable to demonstrate" that revelation of the suppressed material "would" have resulted in a different verdict. This standard is plainly at variance with that articulated by this Court in *Brady* and *Giglio*,** and, indeed, takes the harmless error rule and the requirement of prejudice well beyond the bounds of reason, thus necessitating review by this Court.

Statement of Facts

The basic facts giving rise to this petition fall neatly into three periods:

(1) before and during Rosner's trial; (2) between Rosner's conviction and first appeal; and (3) during the pendency of Rosner's petition for certiorari on direct appeal.

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* Numbers designated "a" in parentheses refer to pages of the appendix, *infra*.

** *Brady* v. *Maryland*, 373 U.S. 83 (1962); *Giglio* v. *United States*, 405 U.S. 105 (1972).

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1. The Period Before and During Trial

On December 5, 1972, Edmund Rosner was convicted of conspiracy, obstruction of justice and three counts of bribery. The conviction was affirmed (*United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973)) and this Court denied certiorari on June 10, 1974 (*Rosner* v. *United States*, 417 U.S. 950), specifically without prejudice to consideration of the then-pending new trial motion which is the subject of the instant petition.

At trial, the chief government witness, police detective and federal undercover agent Robert Leuci, directly contradicted Rosner's testimony that Leuci had entrapped him. The trial court held that:

> The government's case was based principally on the testimony of Leuci, and on the tape recordings which he made of several conversations between himself and the defendants. The other government witnesses' testimony was clearly ancillary and introduced for corroboration of Leuci. . . .
>
> All sides were aware, prior to and during the trial, that Leuci's credibility was a matter of no small significance [and accordingly] the defense made a concerted effort, beginning with its pretrial motions, to locate information damaging to Leuci" (3a).

At a pre-trial hearing on Rosner's discovery motions, Assistant U. S. Attorney Elliot Sagor frankly acknowledged his awareness of this strategy:

> [Rosner's] interest really is, and there is nothing wrong with it . . . to dig up dirt to impeach Detective Leuci's credibility (August 23, 1972 Hearing, Tr. 22; see also H. Tr. 26).

Sagor vigorously opposed the discovery of government files on Leuci, and the defense motion was denied. Shortly

before trial, however—in apparent recognition of an obligation to disclose some material regarding Leuci's criminal past—Assistant U. S. Attorneys Robert Morvillo and Nicholas Scopetta in the presence of other government agents informed defense counsel that Leuci had previously made admissions to certain government agents regarding some "past criminal conduct on his part." These admissions of "past criminal conduct" were—in light of what we now know—trivial: they involved three or four incidents in 1966 and 1967 in which Leuci had acted as an intermediary between persons under investigation by the Narcotics Division of the New York City Police Department and policemen who sought to "shake them down."

Rosner's attorneys, not believing that Leuci's criminal past had been limited to these few misdeeds, pressed the government for further information regarding Leuci's past crimes. But efforts at pre-trial discovery were unavailing; the pre-trial confrontation with Leuci, in the presence of govevrnment attorneys produced blanket denials that Leuci had been involved in any other illegal transactions, and Morvillo reiterated this denial in writing; at the trial, the government vigorously opposed the defense subpoenas of Leuci's records—including those in the possession of the United States Attorney's Office—and the subpoenas were quashed.*

It is now clear that the defense dissatisfaction with the government's non-disclosure both pre-and during trial was well warranted. As a result of the evidence developed in the course of the hearing on petitioner's instant new trial motion, the District Court found that the government possessed—*pre-trial*—the following three categories of knowledge and information regarding Leuci's criminal past:

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* According to Leuci's admissions during the instant proceeding, it is also now established that many of the allegations against Leuci contained in the subpoenaed files were, in fact, true.

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1) The judge found that on July 13, 1972—just one week before Rosner's pre-trial discovery motions were filed—

> Leuci was interviewed in the offices of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 or 1965 he had participated in a warrantless search for drugs alone with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum" (8a).

This crime was of a totally different character than the few incidents Leuci admitted at the Rosner trial: it involved burglary, grand larceny, and, unlike Leuci's admitted crimes, the victim gained nothing. However, "the Goe memorandum, which the government concedes to have been '3500 material,' was not turned over to the defense prior to trial" (8a).

2) The judge further found that

> Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. *Id.*

Indeed, the government conceded that Shaw was aware of the incident as early as Spring 1971 (H. Tr. 458). Moreover, Shaw testified that he discussed this crime with Special Assistant United States Attorney Scopetta (H. Tr. 459).

The judge recognized Shaw's and Scopetta's intimate relation to the trial:

> Shaw and Scopetta were deeply involved in the preparation of the Rosner case. The two men were given primary responsibility for gathering and disclosing to the defense all "3500 material." Shaw also presented the case to the grand jury and, although by the time of trial he had left the United States Attorney's office to become head of the Southern District's Strike Force, he was the government's first witness and by his own admission followed the trial closely. *Id.* at 10.

However, neither Shaw nor Scopetta disclosed their personal knowledge of the "Goe" information to the defense.

3) The judge also found that evidence of still another category of crime committed by Leuci—illegal narcotics transactions—was within the government's possession long before the trial. The evidence was developed as follows:

> In March [1971] Scopetta [then an attorney with the Knapp Commission] ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money (5a-6a).

The trial court recognized "that during the course of [the taped conversation] Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain 'packages' of heroin resulting from arrests." *Id.* The Tape thus not only contains admissions of crime by Leuci, but is also itself direct evidence that Leuci conspired with Lawrence to ob-

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tain drugs illegally. The judge found that "Leuci told Scopetta of this conversation and Scopetta subsequently listened to the tape, which he took with him when he joined the staff of the United States Attorney" in mid-1971 (7a). Despite Scopetta's deep involvement in the preparation of the Rosner case and his "primary responsibility for gathering and disclosing to the defense all '3500 material' " (11a), ". . . the tape was . . . not disclosed to the defense prior to the trial, and only came to light during the final days of the instant hearing, when Leuci made an inadvertent reference to it" (7a).

At the trial, the government revealed nothing which could have lead to the defense discovery of any of these three categories of information and knowledge. Moreover, in "an effort to minimize the impact of . . . information [which would be "damaging to Leuci"], the government prosecutors elicited from Leuci at the very outset of his trial testimony admissions of prior criminal conduct" (4a). But those admissions were limited to the very same three or four misdeeds of which defense counsel had been informed in advance (T. Tr. 163-164a).* Leuci was portrayed as a man who had protected suspects from shakedowns by other—corrupt—policemen, as "sort of a breath of fresh air [whom the suspects] could count on . . . to sit at a mediation of that sort of thing and give them a fair shake" (T. Tr. 363). The total sum of money which Leuci admitted receiving for his role as intermediary was approximately $5-6,000.

Although Rosner's attorneys attempted to elicit from Leuci further admissions of crimes, particularly narcotics crimes, they were totally unsuccessful. Leuci emphatically denied such involvement and insisted that the "last time" he had committed any illegal act was mid-1967 (T. Tr. 353, 380, 384). As the judge noted "Leuci maintained under persis-

* "T. Tr." refers to the transcript of the trial.

tent cross-examination that these [several sales—of information episodes] were the only criminal acts in which he had ever participated" (4a).

Leuci was thus depicted to the jury as a basically fair and honest cop who exercised a restraining influence on corrupt cops; his frank admissions of some past misconduct cast an aura of truth over all of his testimony. In his summation to the jury, Assistant U. S. Attorney Morvillo highlighted this portrait and reminded the jury that:

> Not once, not once did Detective Leuci get caught in any lie, because he didn't lie. [Rosner's defense attorney]—you have all seen him—is an expert. He is one of the best there is. Yet he couldn't shake Detective Leuci with regard to his testimony. There was no inconsistency in Detective Leuci's testimony (T. Tr. 1333).

An episode during the jury's deliberations highlights the fact that the jury was particularly concerned with evaluating Leuci's character and his own corrupt past. After deliberating for 10 hours, the jury sent a note to the judge reporting that during the trial one of the jurors had overheard a conversation in which Leuci had been described as a corrupt cop for . . . nine to eleven years"; and that the entire jury had discussed this piece of information (Tr. 1467). Assistant U. S. Attorney Morvillo's response to the jury's note belies any current claim that the government's case was not built squarely on Leuci's credibility. Morvillo requested that the jury be cautioned "in a very strong way" to ignore the subway conversation (Tr. 1468), arguing that "the information (about Leuci's corrupt past) is *derogatory of the Government's case* and inconsistent with the detective's testimony" (Tr. 1468) (Emphasis added). The trial court's strong instruction to ignore this information about Leuci was quickly followed by the return of the jury's verdict, thus suggesting that questions about Leuci's cor-

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rupt past and credibility were a critical log jam to the jury's unanimity.

It has now been established that Leuci was indeed "a corrupt cop" for many years and that he did lie at trial—and he lied massively: "The crimes to which [Leuci] has now confessed are numerous and go far beyond his admissions at the Rosner trial" (4a). In contrast to the picture presented to the jury, Leuci was a major criminal figure who, over a period of many years had engaged in daily criminal activity.*

The trial court found that:

a) "On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids," (4a) receiving as much as $154,800, perhaps as much as $234,800.

b) "Over a period of perhaps three years, [Leuci] distributed small quantities of heroin [amounts ranging from two to ten "bags" at a time] to informants," (4a) some of whom were in the business of selling drugs. "[I]n exchange for letting (several informants) continue to sell narcotics," Leuci "occasionally" took heroin from them (4a).

c) Leuci "also took money . . . from informants in exchange for letting them continue to sell narcotics" (4a). The total amount of money involved in these pay-offs over a five year period ranged from $43,200 to $144,000.

d) Leuci sold investigative information and advice to members of organized crime for which he received as much as $15,000 over a few years.

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* Based on his own admissions, Leuci committed hundreds upon hundreds of crimes, involving perhaps $200,000 in illegally obtained money, and exposing him—theoretically—to the risk of hundreds of years of imprisonment.

e) Leuci "participated in illegal electronic surveillance" (4a).

f) Leuci "accepted sums of money from lawyers and on one occasion, participated in the paying of a bribe to an Assistant District Attorney" (5a).

g) Leuci admitted to over eleven separate incidents of "(making) payments of money to his superior officers in the Police Department" (5a).

h) "And finally, it is almost supererogatory to add that [Leuci] committed perjury at the Rosner trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers" (5a).

Although it is impossible to total Leuci's admitted crimes and lies, the record of this petition reveals a full time felon and inveterate liar. Certainly, the truth as we now know it is very different from the prosecution's closing argument to the jury:

> ". . . not once, not once did Detective Leuci get caught in any lie, because he didn't lie . . . ."

2. The Period Between the Petitioner's Conviction and the First Appeal

Shortly after his conviction on December 5, 1972, Rosner located several witnesses who claimed personal knowledge that Leuci had engaged in narcotics dealings. On January 12, 1973, Rosner filed a motion for a new trial based on his newly-discovered evidence. At the hearing, held on January 26, 1973, the trial judge found the new witnesses—all long-time heroin addicts—to be non credible, and denied the motion on that ground.

At the very time that Rosner was preparing this first new trial motion, a series of events was occurring in the

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United States Attorney's Office of which the defense and the Court were ignorant—and remained ignorant for over one full year. On December 21, 1972, Richard Lawrence, a/k/a "the Baron," a registered government informer, disclosed to the New York City Special Narcotics Prosecutor's Office that, for a period dating back to 1968, he had had extensive illegal narcotics dealings with Robert Leuci. On January 2, 1973, this information was communicated to the United States Attorney's Office and Assistant U. S. Attorney Robert Morvillo—the chief prosecutor at the Rosner trial—was assigned to "coordinate an investigation to determine the accuracy of these allegations" [affidavit of Robert Morvillo submitted in opposition to motion for new trial]. Morvillo in turn assigned Charles Sherman, an investigator with the Drug Enforcement Administration, the task of conducting "a complete investigation."

A four-part "investigation" ensued:

1) Sherman attempted to locate a person described by Lawrence as a corroborating witness (H. Tr. 277, 312, 317). Morvillo and Sherman both testified that those efforts failed because Lawrence was unable to give sufficient information to locate this witness, identified only as "John" (See H. Tr. 392-395). After Rosner's counsel obtained Sherman's investigative notes, however, Sherman admitted that Lawrence had in fact provided various leads to locate "John" which Sherman had never followed up and Lawrence had named another witness who could have been easily located through the Brooklyn District Attorney's office but who was totally ignored by Sherman.

2) Morvillo confronted Leuci with Lawrence's allegations. Leuci denied the charges and referred Morvillo to the tape recording of the Leuci-Lawrence conversation of March 1971,* claiming that the tape "exonerated" him. On the

* Scopetta had of course been in possession of this tape recording since March, 1971.

basis of that claim, and *without listening to the recording, nor reading a transscript of it,* Morvillo accepted Leuci's self-serving and wholly inaccurate description of the taped conversation.

3) Motor vehicle documents were obtained in an effort to investigate Lawrence's claim that he had given Leuci three automobiles in exchange for drugs. But although the documents corroborate that a number of automobile transfers occurred, that aspect of the "investigation" was promptly terminated upon Leuci's flat undocumented denial of the allegation (See H. Tr. 485).

4) On January 17, 1973, Lawrence, accompanied by Sherman, was flown from New York City to Falls Church, Virginia, for a series of lie detector tests, administered by True Securities Industries, Inc. That firm was chosen by DEA on "a brochure about the new opening" (H. Tr. 424), and it folded within a few months after Lawrence's experience there (H. Tr. 525). On January 18, 1973, True informed Morvillo that Lawrence had failed the polygraph tests. . . . At the hearing on the instant motion, however, Rosner introduced expert testimony which indicated that Lawrence's polygraph test was "at worst inconclusive and could be no means have been adjudged a failure" (22a).

Relying on the "results" of this four-part investigation, Morvillo "decided to abandon any further investigation into Lawrence's allegations (22)a. The trial court found that

> the prosecutors could not help but recognize the similarity between Lawrence's charges and those contained in the affidavits submitted in support of Rosner's motion; they should thus have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion (23a).

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However, as the judge noted, "at no time during the pendency of this motion did the government inform Rosner of Lawrence's allegations" (22a). The Court of Appeals concluded that

> [T]he United States Attorney's office erred seriously in failing to notify the defense about the Lawrence situation. Appellant is right that the prosecutor should not have made a unilateral determination of the credibility of Lawrence when what Lawrence was alleging fitted into the very pattern of conduct suggested by the appellant's motion (57a).

3. The Period During the Pendency of the Petition for Certiorari

In January, 1974, Rosner filed a petition for certiorari on direct appeal in which he alleged "that Leuci had been involved in extensive narcotics violations and shakedowns since 1967." Shortly after filing, petitioner was able to develop new evidence of Leuci's past criminality through a newly discovered witness—the same Richard Lawrence who had, a year previously, given information to the United States Attorney's Office. Based on an extensive affidavit from Lawrence detailing his personal knowledge of Leuci's narcotics dealings, Rosner filed a motion for a new trial on March 20, 1974. A series of events then occurred which establish beyond doubt that the government deliberately failed to inform this Court that it had possessed evidence and knowledge of Leuci's concealed criminal past *prior to the Rosner trial*. Those events are as follows:

"On or about April 8, 1974," during the course of preparing the government's opposition to the new trial motion, Elliot Sagor—the Assistant U.S. Attorney principally responsible for the new trial proceedings—"came into possession of the Goe memorandum" (H. Tr. at 589). According to his own testimony, Sagor "realized right away that

the Goe memorandum, if true, and if in government possession and known to the government at the time, was a document which should have been turned over to defense counsel at the time of trial" (H. Tr. at 593, (24a)). Extremely agitated, he immediately confronted Leuci and asked "what blank idiot knew about this and where has it been?" Leuci testified that Sagor was "up to the third story by that time," and when Leuci incidentally acknowledged that the Goe episode had actually "happened," Sagor "continued going up" (H. Tr. at 97, 98). But despite his new discovery, on April 9, 1974, Sagor filed a memorandum and affidavits opposing the new trial motion which deliberately omitted any reference to the Goe memorandum. Sagor testified to two reasons for his decision not to "mention" the Goe information: "one, because it was not called for at that time . . . by the Lawrence allegations," and "two, my investigation was incomplete as to the validity of the Goe memorandum on that date" (H. Tr. at 593). Neither of these "reasons" are persuasive however: the claim underlying the new trial motion was not limited to "Lawrence's allegations," but rather was that Leuci had committed crimes far in excess of those he had admitted to at Rosner's trial; and Sagor's need to investigate the "validity" of the memorandum—which contained not an allegation against Leuci, but rather an admission by him—cannot explain why Sagor did not "mention" the Goe memorandum after his investigation was completed several days later, nor why he waited more than three months, until after the Supreme Court had denied certiorari, before he mentioned the evidence either to defense counsel or to the appropriate court.

Sometime in April 1975, during the course of his dealings with Leuci, Sagor also learned about the Leuci-Lawrence tape which was made in 1971, and which was known to Nicholas Scopetta, since that time. A transcript of the tape was made and read by Sagor; but, like the Goe memorandum, this pre-trial evidence was not mentioned to the

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defense, to the District Court, to the Solicitor General's office or to this Court pending certiorari.

Moreover, the record establishes that the government's failure to disclose its new discoveries did not result from ignorance of the legal significance of its pre-trial knowledge. Sometime in early April, U.S. Attorney Paul Curran met with Assistant U.S. Attorney John Gordon—the liason between the U.S. Attorney's and the Solicitor General's office in connection with the pending Rosner certiorari petition—and asked him "what the legal effect would be of false testimony by a government witness on collateral matters in a criminal trial . . ." In response, Gordon "asked [Curran] whether we were aware of the falsity of the testimony at the trial . . ." (H. Tr. at 728), and advised Curran that "the government's knowledge" was "a critical factor" in determining whether a new trial would have to be granted (H. Tr. at 732). After that conversation, in mid-April, Gordon read the Goe memorandum himself and discussed it with Sagor, who acknowledged that it constituted "3500 material which had not been turned over to Mr. Rosner at the time of trial . . ." (H. Tr. at 751). Gordon noted that "it was very unfortunate—that we had not turned this thing over, and it was one in a succession of important cases where there had been a failure to turn over 3500 material" (H. Tr. at 752). Sagor admitted at the hearing that he discussed the Goe memorandum with at least six of the Assistant U.S. Attorneys in his office, as well as with his chief, U.S. Attorney Curran.

The last dramatic event in April, 1974 involved Leuci's own recantation of his testimony at the Rosner trial. On April 17-18, 1974, Leuci began to admit to the U.S. Attonrey's Office that he had committed hundreds upon hundreds of serious crimes in addition to the few misdeeds he had revealed to the Rosner jury. But despite the obvious and critical importance of this new development, the United States Attorney's Office did nothing be-

tween April 17 and April 30 to alert the Solicitor General's Office. Nor, according to government testimony, did the U.S. Attorney's Office have any intention of informing the Solicitor General—until approximately April 23, when it realized, after reading the Solicitor General's brief in opposition to Rosner's certiorari petition, that the Solicitor General was preparing to make certain affirmative representations to this Court which were inconsistent with Leuci's new admissions (H. Tr. 745-746).* On April 30, after waiting another week, Assistant U.S. Attorney John Gordon called Deputy Solicitor General Andrew Frey and informed him of Leuci's recantation. Although it is conceded that Gordon knew about the Goe memorandum, he omitted mention of this document and informed Frey that

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* On April 23, 1974, the US.. Attorney's Office did alert the District Court to the new development; but it did so in a manner designed to prevent the full truth from emerging: it sent a secret ex parte letter to the trial Judge stating, inter alia, the following:

> "This is to inform you that *for the first time last week,* Mr. Leuci told the government of certain criminal acts committed by him when he was a member of the Narcotics Division . . . about which Mr. Leuci did not testify at the trial of Edmund Rosner. I stress that *none* of this activity was or *could have been known* to the government then" (H. Tr. at 661-62). (Emphasis added)

It is now undisputed that the italicized portion of that letter was untrue: 15 days prior to sending the letter Sagor had read the Goe memorandum which establishes that various government officials knew of the Goe episode before trial and that the principal prosecutors "could have . . . known" about it by the exercise of minimal diligence. Moreover, the record establishes that one of the two chief prosecutors for purposes of 3500 material, Edward Shaw, did in fact know about the episode, and the other, Nicholas Scopetta, knew about the Leuci-Lawrence taped conspiratorial conversation long before trial, and had been informed about the Goe crime by Shaw. The U.S. Attorney's Office asked that the letter to the trial court be sealed and be made part of the record. The trial judge did so, without even notifying defense counsel that he had received an ex parte communication from the government.

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"the crimes that we discovered that Leuci had lied about had not been known to us at the time of Leuci's false testimony" (H. Tr. at 738).

Moreover, pursuant to a decision made at a meeting between U.S. Attorney Curran and Gordon, the Solicitor General's office was further informed that *it was the position of the United States Attorney's Office that neither the Supreme Court nor defense counsel should be told about the Leuci admissions until the investigation was completed and the material presented to the Grand Jury* (H. Tr. at 763, 767, 769). At the time of that decision, the Rosner case was scheduled in the Supreme Court for an imminent conference and decision and the Leuci investigation could not have been completed in time.

On May 1, 1975, however, the U.S. Attorney's strategy of silence was thwarted. The New York Special Prosecutor filed a lawsuit which publicly disclosed Leuci's admissions.* In light of the lawsuit, Gordon called Assistant Solicitor General Frey and announced that the U.S. Attorney's Office no longer had any objection to informing the Supreme Court of Leuci's perjury. But he failed to tell Frey about the United States Attorneys Office's pretrial knowledge of several of Leuci's unadmitted crimes.

On May 5, 1974, during argument on the Special Prosecutor's suit, Rosner's counsel made an emergency application to the District Court, seeking disclosure of Leuci's admissions. He informed the court and the United States Attorney's Office that, as certiorari was pending, he intended to petition the Supreme Court to order a new trial, relying on the precedent of *Mesarosh* v. *United States*, 352

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* A New York Times article about that lawsuit brought Leuci's admissions to the attention of Rosner and his lawyers for the first time on May 2, 1974; Rosner did not learn until much later, however, about the Goe memorandum and the Leuci-Lawrence tape.

U.S. 1 (1956).** For that reason, he argued, full disclosure of the new evidence was necessary in order fully to inform the Supreme Court of the new developments in the case. The application for discovery was nonetheless denied.

Then, on May 7 1974, the Solicitor General requested a postponement of the conference on the Rosner case and indicated that he would be filing a supplemental brief. Several days later, the Solicitor General sent a telex draft of his proposed memorandum to Gordon and Sagor for suggestions. Both Assistants made corrections which were sent to the Solicitor General's Office the next day. Sagor admitted *adding* the following underlined words to the draft brief (H. Tr. at 812):

> "It should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegation *that the government 'knew about Leuci's additional criminal conduct'* which the U.S. Attorney denies and which is potentially critical to the disposition of the new trial motion." (Emphasis added under Sagor's addition)

This written addition—stating that the "U.S. Attorney denies" that the government "knew about Leuci's additional criminal conduct"—was patently false; at the time Sagor made this charge he knew about the Goe memorandum and the Leuci-Lawrence tape and he knew that government agents and attorneys had been aware of some of Leuci's undisclosed criminality prior to the Rosner trial.

The supplemental memorandum finally filed by the Solicitor General contained a slightly amended version of Sagor's revised sentence:

** In *Mesarosh*, the Supreme Court itself ordered a new trial after the government had informed it, while certiorari was pending, of newly discovered evidence impeaching the credibility of a government witness.

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> "It (the determination whether a new trial should be granted by the trial judge) should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegations, *which the U.S. Attorney denies,* and *which is potentially critical to the disposition of the new trial motion,* that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci" (at 10) (Emphasis added).*

On May 28-29, 1974—while the petition for certiorari was still pending—Rosner filed a formal motion in the lower courts seeking disclosure of Leuci's admissions in order to bring this information to the attention of this Court. Both Sagor and Gordon were physically present during the proceedings and both were fully aware of Rosner's intention to seek an order for a new trial directly from the Supreme Court; but at no time did they reveal, either to defense counsel or to the Courts, that the government had possessed pre-trial knowledge of the Goe episode and of the incriminating tape of March, 1971.

On June 10, 1974, the Supreme Court denied Rosner's petition for a writ of certiorari, without prejudice to the new trial motion. Weeks later, in late June, on the eve of the hearing on the new trial motion, the government finally revealed to Rosner's counsel the existence of the Goe memorandum. And it was not until the very close of that hearing, on July 15-16, 1975, when Leuci made an "inadvertent" reference to it, that Rosner's counsel learned of the long-possessed Leuci-Lawrence tape.

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* At the time this statement was made to the Supreme Court, it appears that no one in the Solicitor General's Office was aware that the Goe memorandum and the Leuci-Lawrence tape had been in government files and known to government attorneys before the Rosner trial.

Reasons for granting the writ

I

This Court should grant the writ in order to determine whether a showing of "ultimate prejudice" is required as a condition of granting relief where A) the United States Attorney's Office deliberately withheld from the District Court, pending a motion for a new trial, critical information of unquestioned relevance to that motion; and B) the United States Attorney's Office deliberately withheld from this Court, pending a petition for a writ of certiorari, significant information which could have affected the outcome of the petition.

There is no question, in this case, that the United States Attorney's Office committed serious and deliberate acts of misconduct at two critical post-trial stages: the Court of Appeals explicitly found that "the United States Attorney's Office erred seriously in failing to notify the defense about the Lawrence situation" (57a); it also assumed—as the uncontradicted record required it to do—that the United States Attorney's Office "should have specifically told the Supreme Court of the Goe memorandum and the circumstances surrounding it as evidence of the government's knowledge of it during trial . . ." (58a). The only question before this Court is the purely legal one, whether there is to be any effective remedy for deliberate post-trial misconduct by government attorneys. The lower courts held that it will not impose any sanction on the government for the post-trial deliberate misconduct of its attorneys, unless the defendant can demonstrate that he was ultimately prejudiced by the misconduct. The inevitable consequence of this formulation, however, is that there can *never* be any remedy for post-trial suppressions, regardless of how deliberate or serious they may be. For once any

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post-trial suppression is discovered, the defendant will always be free to present the newly revealed evidence to a court and therefore cannot—as a matter of definition—suffer "ultimate" prejudice. (And, of course, if the post-trial suppression is *not* discovered, then there will never be an opportunity to provide a remedy for the government's misconduct.) The implications of this formulation are disastrous: government attorneys will have nothing to lose and everything to gain from deliberate suppression of all evidence favorable to the defense which the government discovers after trial. For if the defense ultimately discovers the evidence, the government will be in *precisely the same position as if it had immediately and voluntarily disclosed* the new evidence to the defense. But if the evidence is not discovered, then the government will have successfully suppressed evidence damaging to its case. This paradox is best illustrated by the very facts of this case. Consider a calculating U.S. attorney deciding whether to disclose A) Richard Lawrence during the pendency of the new trial motion and/or B) the Goe memorandum during the pendency of a certiorari petition. Aware of the approach adopted by the lower courts in the case, he would reason as follows: if he discloses the damaging information now, it will be considered by the courts and may endanger the conviction; if he deliberately suppresses it and is eventually caught, the only consequence that he will suffer is that the information will be considered by the courts *just as if he had voluntarily disclosed it.* If, on the other hand, he is not caught, the courts will never learn about it. Recognizing that he has everything to gain and nothing to lose, the only logical action for a calculating U.S. Attorney to take, therefore, is to suppress the evidence. Clearly, in order to deter calculated post-trial suppression of evidence, the courts must impose some cost or penalty on such decisions when they *are* discovered.

The Seventh Circuit recently confronted a case of post-trial suppression and deemed reversal to be the "required"

penalty for the government's transgressions, despite the conceded fact that the defendant had not been specifically prejudiced by the suppression. *United States* v. *Ott,* 489 F.2d 872 (7th Cir. 1973). There is thus a direct conflict among the circuits as to whether a new trial is the appropriate remedy for deliberate post-trial suppression. Ott was convicted on three counts of knowingly possessing checks stolen from the mail. Moshis, a government informer, testified that he and a man named T. W. Allen had bought checks from mailmen and sold them to the defendant. At trial the attempts by Ott's counsel to establish that Allen was an informer too were met by denials by the prosecutor. Upon questioning during oral argument before the Court of Appeals, however, government counsel conceded that T. W. Allen was the same person identified as "a reliable informant," in another case previously heard on appeal.

Although the Court assumed that the government trial attorney had not been aware that his representation at trial was false, the Court had harsh words for the government's handling of its error subsequent to trial:

> "[T]his court is entitled to expect candor from attorneys representing the United States. Even though appellate counsel for the government knew that trial counsel had misled the trial judge in connection with a ruling challenged on appeal, no disclosure of that fact was made to the appellant or to this court prior to oral argument. Only after questions from the bench, which were prompted by familiarity with the record in the *Carmichael* case, did government counsel make the disclosure. At that time the acknowledgement was both forthright and unequivocal. Nevertheless, if silence would have served to perpetuate continued judicial reliance upon the prosecutor's false statement, it is evident that

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> the attorney for the sovereign would have been content." *Ott,* at 874.*

The Court found a "combination of factors which, together, compelled reversal of Ott's conviction. *Ott, supra,* at 876. The same factors are evident here. First, the Ott Court noted it was a member of the United States Attorney's Office who had made the misrepresentation. Here members of that same office engaged in the deliberate suppression of Richard Lawrence, information concerning the Goe episode and the Leuci-Lawrence tape.

Second, the Ott Court noted that the trial prosecutor had made an "unequivocal" statement that T. W. Allen was not an informer. Here, the U.S. Attorney's office vigorously insisted that its "thorough" investigation had "proven" that Lawrence's allegations about Leuci's drug dealing were entirely false and it falsely represented to this Court that the government had had no pre-trial knowledge of Leuci's additional crimes. Further, in *Ott,* "even though Allen's true status was collateral to the issue presented to the judge, both parties sought to influence the

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* The Court cited the American Bar Association's Final Draft of the Proposed Code of Responsibility at 107, stating "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers." The *Ott* Court observed that the "principle underlying such a rule is broad enough to encompass not only deceptive acts, but also deceptive omissions" (footnote omitted). *Ott, supra,* at 874. See also the American Bar Association's Project on Standards for Criminal Justice, which gives explicit recognition to the prosecution's "continuing" obligation to notify the defense of information suggesting that trial testimony—including credibility evidence—may have been false. *The Prosecution Function and the Defense Function,* Supp, March 1971, at p. 9, § 5.6(a) and Commentary. And see *United States* v. *Polisi,* 416 F.2d 573 (2d Cir. 1969); cf. *United States* v. *Harris,* 498 F.2d 1164 (3d Cir. 1974); *Christman* v. *Hanrahan,* 500 F.2d 65 (7th Cir. 1974).

court in the exercise of its discretion by appealing to different versions of that status." *Id.* Obviously, Leuci's "status" was significantly less collateral than was Allen's in Ott's trial. Indeed, at the first new trial motion—during which the Lawrence allegations were suppressed—the *only* issue was Leuci's credibility and alleged criminality.

The final—and to the Court perhaps "most troublesome" —aspect of the government's lack of professionalism in *Ott* was its failure to apprise the Court of Appeals (or the appellant) of the true facts "long after the pressures of the trial were past." Again, there is a clear parallel in the case at Bar. The two critical decisions—first to withhold information about Richard Lawrence from the District Court and second to withhold information about the Goe memorandum and Leuci-Lawrence tape from this Court were deliberate and *sustained over a long period of time.* Nor were they made under conditions of stress, during the hectic moments of a trial. As the Second Circuit observed in excusing the prosecution from inadvertently neglecting to disclose certain information when it had been confronted suddenly with a surprise defense witness and forced to prepare rebuttal testimony overnight:

> "Prosecutors under such stress cannot properly be held to standards quite as exacting as those that may be appropriate when they have had days or even weeks to consider whether a disclosure should be made." *United States* v. *DeSapio,* 435 F.2d 272, 288 (2nd Cir. 1970).

Here of course the U.S. Attorney's Office had "days—even weeks," to consider whether or not to reveal Richard Lawrence and whether or not to inform this Court of its pre-trial knowledge of Leuci's past. But on both counts, it chose to remain silent.

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This Court has long recognized that without complete candor and honesty from counsel who practice before it, decision-making processes may become corrupted. In *Mesarosh* v. *United States*, 352 U.S. 1 (1956), this Court thus approved the decision of the Solicitor General to inform the Court of evidence discovered while certiorari was pending, which tended to suggest that a particular government witnes might have testified falsely at trial. The Solicitor General had felt "compelled" by his "duties as officer of the court and as public prosecutor" to notify the Court of the new information, and the Court frankly commended "the action of the Solicitor General . . . in promptly bringing the matter to our attention when it came to the attention of his office . . ." 352 U.S. at 8, 9. More recently, in *Fusari* v. *Steinberg*, 95 S. Ct. 533, 540 (1975), speaking in a related context, Chief Justice Burger emphasized the importance of candor on the part of counsel: "This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of *any* development which *may conceivably* affect an outcome" (Emphasis added).

The actions of the government attorneys in this case fly directly in the face of these teachings. They did not merely fail to fulfill their "duty to inform the Court of any development which *may conceivably* affect an outcome;" they made a series of premeditated and strategic decisions to violate that duty and intentionally to withhold undeniably relevant information from the courts. Indeed, the misconduct of the U. S. Attorney's Office in this case is far worse than the distasteful situation in *Ott*, for which the Court found reversal to be the "required penalty."

The lower courts here denied a new trial because they could "see no prejudice to Rosner" from the government's misconduct, first because the District Court eventually con-

sidered the suppressed information and second because the Supreme Court "may well have another opportunity to pass on Rosner's contentions." This narrowly focused inquiry misses the broad implications of failing to provide a remedy for the government's post-trial suppression of information. If the lower court's rule is permitted to stand, the prosecution will never suffer a meaningful sanction. It will be encouraged to continue to withhold information which it deems "trivial," and will have no incentive to exercise care in its designation of information as insignificant.* Here, the information suppressed by the government eventually became known. Disclosure may never be made in future cases, however, if the government is not effectively deterred by a reversal here.**

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* Cf., *United States* v. *Nixon*, 498 U.S. 683 (1974).

** Appellant strongly suspects that there is yet more relevant information which is still in the possession of the government in this case. Yet under the lower court's theory, there will be no effective remedy if it turns out that the government is *still* withholding evidence favorable to Rosner.

Subsequent to the decision of the District Court denying the new trial motion herein, counsel for petitioner learned of yet another serious crime committed by Robert Leuci and known to Assistant United States Atorneys Scopetta, Shaw, Sagor and Morvillo, prior to Rosner's trial and neither revealed at trial nor at the hearing on the current new trial motion. At the hearing on the current new trial motion, Leuci testified that his last crime was committed in 1970 and denied that he committed any crimes after commencing work for the government as an undercover agent (H. Tr. 197-98). The opinion in *Corso* v. *United States*, 389 F. Supp. 659 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975), discloses that Leuci participated in the installation and maintenance of an illegal warrantless wiretap in the Fall of 1971 after he began working for the government as an undercover agent and that Scopetta and Shaw were aware of this by the time of Corso's trial in February 1972, many months before Rosner's indictment and trial.

In the Corso hearing, Leuci admitted that he probably told Elliot Sagor, one of the trial prosecutors and the chief prosecutor

[Footnote continued on following page]

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Accordingly, the only appropriate remedy for the government's misconduct in this case must be to order a new

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representing the government at the hearing on the instant new trial motion, before the Rosner case, of his participation in this serious crime which he failed to note in his testimony at Rosner's trial, (C. Tr. 107-08, C. Tr. refers to the transcript of the hearing on the new trial motion in *Corso* v. *United States*, 74 Civ. 720). Shaw testified at the Corso hearing that he was told in no uncertain terms that a crime had been committed; indeed he contemplated a prosecution of those who had illegally tapped the wire (C. Tr. 123). Shaw also testified that he was sure Whitney North Seymour Jr., the United States Attorney, knew of the illegal tap and that Robert Morvillo, the chief prosecutor at Rosner's trial, and the head of the criminal division in the United States Attorney's Office, knew something about it (C. Tr. 135). Scopetta testified that after learning of the illegal warrantless tap he thought he was going to end up with a case of illegal wiretapping against the detectives involved, *including Leuci* (C. Tr. 151). Scopetta also testified that Leuci prepared a memorandum of the illegal act (C. Tr. 168). Leuci corroborated this and testified that Scopetta had "told me to make a memo out and detail the whole thing as soon as possible . . ." (C. Tr. 90), and that he prepared the memorandum a month after Corso's arrest (C. Tr. 99) well before Rosner's indictment and trial. The first draft of the memo was taken by Scopetta in long hand (C. Tr. 99). Former Detective Nicholas Lamattina corroborated Leuci's testimony that Sagor knew about the illegal warrantless wiretap (C. Tr. 272).

These facts establish that Sagor and Morvillo, the trial prosecutors and Scopetta and Shaw, the prosecutors who were given primary responsibility for gathering and disclosing to the defense all 3500 material, had actual pre-trial knowledge of Leuci's participation in yet another serious crime which was not revelaed at either the trial or the instant new trial hearing and that a memorandum of this crime, prepared by Leuci, was in the actual possession of the United States Attorney's Office before Rosner's trial and that the government failed to turn this memorandum over to the defense either at the trial or at the instant new trial hearing. These facts only came to the defense's attention after the denial of the new trial motion. Although they are dehors the record of the hearing on that motion, we feel obligated to bring them to this court's attention. See, *Fusari* v. *Steinberg, supra.*

trial. That is the remedy which Rosner was seeking from the District Court and from the Supreme Court, when the government chose to suppress information supportive of Rosner's case. The penalty which most appropriately fits that governmental misconduct will be to order that relief now. Indeed, without an effective sanction against failure to disclose such evidence after trial, government attorneys may be encouraged to conceal new evidence and there will be no deterrent to deliberate government decisions to suppress the truth.

This Court has never explicitly considered whether an effective sanction should be imposed against the government for deliberate post-trial suppression of relevant information. The instant case presents an ideal record on which to decide that issue: the facts are not in dispute and the lower courts held clearly that absent a showing of "ultimate prejudice" no sanction will be imposed against the government. Moreover, it is a case which directly implicates the integrity of this very Court's decision-making process. See, *Fusari* v. *Steinberg*, 95 S. Ct. 533, 540 (1975).

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II

This Court should grant the writ in order to determine whether the Second Circuit applied the correct standard in ruling that where A) the government's principal witness has committed massive and flagrant perjury about his own criminal background and vulnerability; and B) the responsible government attorneys negligently suppressed evidence of that background before trial and neglected to correct the perjury during the trial, a new trial may not be granted unless the defendant has satisfied the burden of proving that "the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction."

Again, there is no factual dispute over this issue. The courts below both found that Robert Leuci committed massive and flagrant perjury, and that (as the government itself conceded) the Goe memorandum was 3500 material that should have been turned over to the defense, but instead was negligently suppressed. The lower courts also decided the case on the assumption that the Leuci-Lawrence tape —which contained evidence of Leuci's involvement in narcotics crimes which he denied on the witness stand—should have been disclosed as well. But the courts ruled that these errors taken separately or cumulatively, were "harmless," since the defendant had failed to show "ultimate prejudice."

The lower courts' requirement that the defendant must show ultimate prejudice in a case involving massive perjury by the government's principal witness flies in the face of the leading precedent of this Court. In *Mesarosh* v. *United States*, 352 U.S. 1 (1956), this Court ordered a new trial based on post-trial collateral information which raised the possibility that a certain government witness perjured himself at the petitioner's trial. The Court found that the credibility of witness Mazzei, who was one of seven govern-

ment witnesses at trial, had been "wholly discredited" by the fact that he had testified in a bizarre and non-credible fashion in several proceedings that *followed* the petitioner's trial. Although the government did not concede that Mazzei had committed perjury at the trial in question, the Court concluded that in light of the conceded post-trial erosion of the witness's credibility, the "conviction is tainted, and there can be no other just result than to accord petitioners a new trial."

The instant case presents a far stronger case for reversal than did *Mesarosh*. Here, as in *Mesarosh*, the witness had worked for years as an undercover agent for the government and he testified at trial in his capacity as government employee and agent. But here, the witness was not merely "a paid informer" (352 U.S. at 11); he was a police officer working as a full-time federal agent on an undercover assignment for the United States Attorney's office, and as the Court of Appeals found, "part of the 'prosecution'" in this case (52a). And here too, as in *Mesarosh*, "it is the government which now questions the credibility of its own witness. . . ." (352 U.S. supra at 11). But here the government does more than merely question; it has conceded that Leuci deliberately committed perjury at Rosner's trial as well as in other related contexts which preceded the trial, and that his credibility is thus shattered. Moreover, here, unlike in *Mesarosh*, Leuci was not merely one of seven government witnesses; he was the *only* significant witness and without him there would have been no case.* And finally

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In marked contrast to the position the government is now forced to take with regard to the importance of Leuci's live testimony, at the trial the government repeatedly emphasized to the jury that a guilty verdict would rest squarely on Leuci's credibility and on the absence of a motive to testify falsely against Rosner (see, e.g., T. Tr. pp. 1299, 1332-1333). Indeed the prosecutor acknowledged that information which suggested that Leuci lied about his own past would be "derogatory of the government's case" (T. Tr. p. 1469). Moreover, the indictment against Rosner was based entirely on Leuci's testimony before the grand jury.

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here, unlike in *Mesarosh*, the petitioner had "made a concerted effort, beginning with his pre-trial motions, to locate" the very kind of information "damaging to Leuci" which the Government had in its possession (3a).

In *Mesarosh*, the Court did not require the defendant to demonstrate "ultimate prejudice"; indeed, it required *no* showing of prejudice whatsoever, and even rejected the government's request that the case be remanded for an evidentiary hearing. The Court focused instead on the integrity of the judicial process and concluded that to sustain a conviction in the face of the witness's history of perjury would be to pollute "the waters of justice." Here the pollution would be even greater, since the lower courts found not only "flagrant" perjury at the trial itself but also government suppression, both negligent and deliberate. Clearly, had Leuci's perjury been evaluated under the *Mesarosh* standard, Rosner could not have been denied a new trial.

Even if prejudice may properly be considered in a case where the government's critical witness is wholly discredited, the burden and standard for considering prejudice must be the one articulated by this Court in *Chapman* v. *California*, 386 U.S. 18 (1967). In *Chapman*, the Court, quoting *Fahey* v. *Connecticut*, 375 U.S. 85, 86-87 (1963), stated:

> "The question is whether there is *a reasonable* possibility that the evidence complained of might have contributed to the conviction" *Chapman, supra*, at 23 (emphasis added).

Furthermore, *Chapman* held that the burden was on the government to prove beyond a reasonable doubt that its constitutional error* did not contribute to the conviction.**

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* That suppression of favorable evidence is constitutional error is clear from the Court's statement in *Brady* v. *Maryland*,

[Footnote continued on following page]

The Court of Appeals here applied a standard completely at variance with the one applied in Chapman.*** It held that:

> "The question presented, then, is whether there is a significant chance that skilled counsel could have developed the evidence of Leuci's criminality contained in the Leuci-Lawrence tape and the Goe Memorandum to impeach his credibility to the extent that a juror *would be led* to reasonable doubt about Rosner's guilty. We emphasize that the standard demands *more than the possibility* of a different result upon retrial. . . . An Appellate Court must weigh whether or not there is in reality a 'significant chance' that the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction" (38) (Emphasis added).

There can be no doubt that there is an irreconcilable conflict between the *Chapman* standard and that applied by the

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373 U.S. 83, 87 (1963): "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the porsecution." Nor is the constitutional import any less when the nondisclosure is of "evidence affecting credibility" of a government witness. *Giglio* v. *United States*, 405 U.S. 150, 154 (1971) citing *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

** The Court stated:

> "Certainly error, constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless. . . . [W]e hold . . . [therefore] that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

*** The *Chapman* standard has been repeatedly reaffirmed by this Court. See, e.g., *Fontaine* v. *California*, 390 U.S. (1968); *Anderson* v. *Nelson*, 390 U.S. 523 (1968); *Harrington* v. *California*, 395 U.S. 250 (1969); *Whitely* v. *Warden*, 401 U.S. 560 (1971); and *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

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Court of Appeals in the instant case. *Chapman*, held that the standard for reversal requires no more than that "there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction" 386 U.S. at 23. (Emphasis added). Here the court specifically rejected that standard: "We emphasize that the standard demands *more than the possibility* of a different result upon retrial. . . ." (38a). (Emphasis added). Moreover, the lower court expressly placed the burden of demonstrating prejudice on the defendant: "*he* [appellant's counsel] has been *unable to demonstrate* any ultimate prejudice to appellant by the government's alleged misconduct" (61a). (Emphasis added). This too is in irreconcilable conflict with the *Chapman* standard which requires that a new trial be ordered unless "*the State has demonstrated*, beyond a reasonable doubt" that the error was harmless. 386 U.S. at 26.

The only difference between *Chapman* and the instant case is that in *Chapman* the constitutional error was the introduction into evidence of material that should have been *excluded*, whereas here the constitutional error was the failure to introduce material which should have been *presented* to the jury. But plainly, this difference cannot justify a distinction between the constitutional standards to be applied in determining whether the error was harmless. Indeed, in *Giglio* v. *United States*, 405 U.S. 150 (1971), this Court reaffirmed the *Chapman* standard precisely in the context of a failure to present certain impeachment evidence to the jury. In that case, as here, evidence contained in government files, relevant to the credibility of the government's key witness and inconsistent with his trial testimony, was withheld from the jury. The Court "granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Brady* v. *Maryland*, 373 U.S. 83 (1963)." *Giglio* supra at 151.

In answering that question, the court declined to consider "whether the nondisclosure was a result of negligence or design." *Id.* at 154. Nor did it pause to analyze the case under the criteria used by the Second Circuit; it did not ask "whether there is a significant chance that skilled counsel could have developed the [concealed] evidence . . . to the extent that a juror *would be led* to reasonable doubt about [the defendant's] guilt" (38a). (Emphasis added). On the contrary, the *Giglio* Court applied a standard for less burdensome to the defense: rather than demanding "*more than the possibility* of a different result upon retrial" (*Rosner* supra, Emphasis added), it held that "a new trial is required if 'the false testimony *could* . . . *in any reasonable likelihood* have affected the judgment of the jury . . . *Napue* supra at 271." *Id.* at 154. (Emphasis added). In effect, the *Giglio* standard does no more than restate *Chapman*: once the constitutional error is established—that is, once it is shown that the government failed to disclose evidence which could have unmasked false testimony (regardless of "whether the non-disclosure was a result of negligence or design")—reversal is required unless the government demonstrates beyond a reasonable doubt that the false testimony could *not* have affected the judgment of the jury. Applying this standard, the Court in *Giglio* ordered a new trial, noting that the concealed evidence would have been "*relevant* to [the witness's] credibility" and that therefore "the jury was *entitled* to know of it." *Id* 154-155. (Emphasis added).

Lest there be any doubt that the burden on the government is at least as high when evidence affecting the credibility of a key government witness is withheld from the jury as when evidence is improperly presented to the jury, *Davis* v. *Alaska*, 415 U.S. 308 (1974) lays that doubt to rest. In *Davis*, the Court reversed a conviction because the defendant had been prevented from revealing to the jury certain evidence contained in the juvenile record of

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the chief prosecution witness which, according to the defense theory, would tend to impeach the credibility and motivation of the witness. The Court emphasized the importance of leaving determinations of credibility and the impact of impeachment evidence to the jury:

> . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. *Id* at 318.

Accordingly, as in *Giglio,* the Court refused to second-guess the jury and make a finding as to whether the withheld evidence would have produced a different result:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning [i.e. that the witness had an ulterior motive stemming from his delinquent record] had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's [the witness's] testimony which provided "a crucial link in the proof . . . of petitioner's act." quoting *Douglas* v. *Alabama,* 380 U.S. 415, 419 (1965). *Id.* at 317.

Moreover, it noted that depriving the jury of evidence relevant to a key government witness's credibility,

> "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis,* 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed. 2d 314. *Smith* v. *Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed. 2d 956 (1968). *Id.* at 318.

There can be no doubt that under the standard applied by this Court in *Chapman* and *Giglio,* Rosner would not have been required to sustain the burden of proving that a juror positively "*would be led* to reasonable doubt about Rosner's guilt" in order to persuade the court that he was entitled to have the concealed evidence presented to the jury. Indeed the obligation established by the Court of Appeals in this case, requiring the defendant to demonstrate that there is "*more than the possibility* of a different result upon retrial" is wholly inconsistent with the interdiction that appellate courts refrain from "speculat [ing] as to whether the jury" would have accepted a defense theory and discredited a government witness.

Had the standard articulated by this Court been applied here, it is beyond dispute—nor do we understand the government to allege—that Rosner could not have been denied a new trial. The lower court rested its conclusion that petitioner had failed to demonstrate prejudice on its assumption that the jury in rejecting Rosner's entrapment defense, had relied on tape recorded conversations between Leuci and Rosner, and not on the credibility of Leuci's live testimony concerning certain critical unrecorded conversations "Leuci was not the lynchpin of the government's case; the tapes were"* (43a). Indeed, the district court assumed that Leuci's credibility would have been undercut by the disclosure of his perjury and past criminal career, but concluded nonetheless that the jury would have reached the same result without Leuci's live testimony (14a). Various objective factors in the case establish, however, that there is at the very least a "reasonable likelihood" that some of the jurors would have been influenced by the destruction of Leuci's credibility and that disclosure to the jury of the truth about Leuci "*could* . . . have affected the judgment of the jury." These factors include the following:

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* In another context, however, this District Court described Leuci as "the government's principal witness at trial." *Special Prosecutor of New York* v. *United States Attorney For S.D.N.Y.,* 375 F. Supp. 797, 799, 806 (S.D.N.Y. 1974).

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1. It is a matter of record that in its presentation of the case to both the grand and petit juries, the government relied centrally on Leuci's live testimony. Indeed, the tape recordings were not even played before the grand jury. Moreover in summation to the jury, the prosecutor pitted Leuci's version of the unrecorded meetings against Rosner's and highlighted the portrait of Leuci as an honest, trustworthy cop. He emphasized:

> Not once, not once did Detective Leuci get caught in any lie, because he didn't lie. Mr. Krieger—you have all seen him—is an expert. He is one of the best there is. Yet he couldn't shake Detective Leuci with regard to his testimony. There was no inconsistency in Detective Leuci's testimony (Tr. 1333).

The trial court consistent with the prosecutor's argument instructed the jury that:

> . . . . There are substantial differences in the testimony. Indeed, *the versions of the Government and defense witnesses are in such sharp divergence on key points,* that it may be suggested that this irreconcilable conflict is not due to forgetfulness or lack of recollection. *Both versions cannot be true.*" (Tr. 1419). (Emphasis added)

2. It is also a matter of record that the trial court, without objection from the government, submitted the entrapment defense to the jury. The law is clear that this defense should be submitted only upon a judicial determination that there is sufficient evidence from which the jury could have acquitted the defendant. *United States* v. *Riley,* 363 F.2d 955 (2d Cir. 1966); *United States* v. *Marcello,* 423 F.2d 993 (5th Cir.), *cert. denied,* 398 U.S. 959 (1970); *United States* v. *Payseur,* 501 F.2d 966 (9th Cir. 1974). It is thus the law of the case that this jury could, on the basis of the conflict between Rosner's and Leuci's testimony, have acquitted Rosner on the ground of entrapment.

3. It is also a matter of record that after six hours of deliberation the jury requested the conflicting Leuci and Rosner versions of the critical unrecorded meetings and after four more hours reported that one juror had overheard Leuci descibed as "a corrupt cop . . . for 9 to 11 years." The prosecutor, arguing that such information "is derogatory of the government's case and inconsistent with the Detective's testimony," sought and received a strong direction from the trial court to ignore this information (Tr. 1468).*

4. It is further a matter of record that in its argument to the Court of Appeals and to this Court on the direct appeal, the government relied on the credibility of Leuci's live testimony concerning the critical unrecorded meetings. See Government's Brief on Appeal at pp. 21-24 and Government's Opposition to the previous petition for certiorari at pp. 4-7, and especially at 10-11 n. 10, where the Government makes a special effort to explain the jury's acquittals on the first two counts of the indictment which involve unrecorded conversations.

It is thus objectively clear from the record that the jury could well have reached a different verdict had the government's sole substantive witness been presented in his true light—as an inveterate perjuror and completely corrupted abuseor of the people's trust. The lower court's speculative conclusion that the verdict would have been

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* In his recent concurring opinion in *Mullaney* v. *Wilbur*, 95 S.Ct. 1881, 1893 (1975), Mr. Justice Rehnquist suggested that expressed juror concern with obtaining further instructions on a particular issue may be inconsistent with a finding of harmless error in relation to that issue. He noted that the state court's "reason for not treating the possibility that the error was harmless may have been because, as this Court's opinion points out, ante, p. 1884, the jury came back in the midst of its deliberations and requested further instructions on the doctrine of implied malice aforethought and the definition of "heat of passion."

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the same can only be tested if a new trial is granted and if the new jury is presented with the true picture, as we now know it, of the government's critical witness.

CONCLUSION

This is a case ideally suited to Supreme Court review, since there are no significant dispute of facts and since the only issues are ones of remedy. As to the pre-trial suppression and trial perjury, the lower court expressly applied a burden and standard in direct conflict with this court's decisions in *Giglio* and *Chapman* as to deliberate suppression pending a new trial motion, there is a direct conflict between the Second Circuit's requirement of prejudice (which can never, by definition, be met in a post-trial suppression case) and the Seventh Circuit's prophallactic approach in *United States* v. *Ott,* 489 F.2d 872 (1973). As to the deliberate withholding of relevant information before this court, this is a case of first impression uniquely suited to consideration by this court.

For the foregoing reasons petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of District Court

72 Cr. 782

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

EDMUND A. ROSNER,

BAUMAN, D. J.

For the third time Edmund Rosner has moved for a new trial based on newly discovered evidence. He was convicted before me on December 5, 1972, of conspiracy, obstruction of justice, and of three counts of bribery.[1] his conviction was affirmed by our Court of Appeals, *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), and the Supreme Court has recently denied certiorari — U.S. — (June 10, 1974) without prejudice to this court's consideration of the instant motion.

When originally filed, defendant's motion relied principally on the allegations of one Richard Lawrence, a registered government informant, that Robert Leuci had committed perjury at the *Rosner* trial by failing to disclose

[1] One count alleging removal of government documents was dismissed prior to trial, *United States* v. *Rosner*, 352 F. Supp. 915 (S.D.N.Y. 1972), and the jury acquitted Rosner on two counts of bribery.

extensive criminal activity. For those whose memory of *Life* magazine has already dimmed it will be recalled that Leuci was and is a detective in the New York City police department who, at the time of the events described in the indictment, was posing [2] as a corrupt policeman in furtherance of various investigations then being conducted by the United States Attorney's Office. Approximately one month after this motion was filed, on April 17, 1974, Leuci first revealed to members of the United States Attorney's Offices for the Southern and Eastern Districts of New York that his past criminal activities had been far more extensive than he had previously acknowledged, and that he had indeed committed perjury at the *Rosner* trial in this respect.[3] Because the motion was made during the pendency of defendant's petition for certiorari, the holding of a hearing was deferred until after the Supreme Court had disposed of the petition. A hearing then commenced on July 1, 1974 and, after a week's interruption, concluded on July 16. What follows constitutes my findings of fact and conclusions of law.

A thorough exposition of the evidence developed at the trial can be found in the opinion of the Court of Appeals at pp. 1215-1219, and I shall set forth here no more than is necessary to give context to the discussion that follows. During October, 1971, Rosner was under indictment in this district along with Nicholas DeStefano in 70 Cr. 1030.[4] Leuci, acting in an undercover capacity, approached DeStefano and Nicholas Lamattina and offered, through a supposed contact in the United States Attorney's Office, to

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[2] As shall appear more fully below, the usage is ironic.

[3] For other consequences of Leuci's revelations, see *Special Prosecutor of the State of New York* v. *United States Attorney*, 375 F. Supp. 797 (S.D.N.Y. 1974).

[4] The indictment was ultimately dismissed. See *United States* v. *DiStefano*, 464 F.2d 845 (2d Cir. 1972).

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provide information about that case as well as others then pending in this district. Rosner was later brought into the negotiations and ultimately participated in the payment of several thousand dollars to Leuci in exchange for grand jury minutes and statements of prospective government witnesses ("3500 material") in 70 Cr. 1030. There were five separate payments, over a period of three weeks, each of which formed the basis of a bribery lharge. Rosner was acquitted of two of these charges, describing payments which took place on October 4 and October 8, and convicted of three others, which involved payments occurring on October 12, 13, and 19. He was also convicted of conspiracy and obstruction of justice. The essence of Rosner's defense was entrapment, a theory which the jury apparently rejected at least with regard to five of the seven counts. See 485 F.2d at 1220-1223.

Although both DeStefano and Lamattina had pleaded guilty prior to the commencement of the trial,[5] neither was called as a witness. The government's case was based principally on the testimony of Leuci, and on the tape recordings which he made of several conversations between himself and the defendants. The other government witnesses were Assistant United States Attorneys and surveillance agents, whose testimony was clearly ancillary and introduced for corroboration of Leuci. All sides were aware, prior to and during the trial, that Leuci's credibility was a matter of no small significance. The defense therefore made a concerted effort, beginning with its pretrial motions, to locate information damaging to Leuci.[6] In an effort to

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[5] DeStefano's plea was entered after the jury was selected but prior to the presentation of evidence.

[6] For example, on July 21, 1972 the defense filed motions for discovery in which they sought disclosure of all matters contained in New York City Police Department files concerning complaints of misconduct, investigations, or disciplinary proceedings against Leuci.

minimize the impact of such information, the government prosecutors elicited from Leuci at the very outset of his trial testimony admissions of prior criminal conduct. He testified to four such acts: on four occasions between 1966 and 1968, he had acted as an intermediary between detectives in the Narcotics Division and those under investigation by that division. Actually, he arranged to sell the information gathered by other detectives to those being investigated, and in the four incidents he described he had accumulated approximately $6,000. Leuci maintained under persistent cross-examination by Rosner's trial counsel that these were the only criminal acts in which he had ever participated.

I.

On April 17, 1974, as I have already noted, Leuci made what he now claims is a full disclosure of his prior wrongdoing. The crimes to which he has now confessed are numerous and go far beyond his admissions at the *Rosner* trial. A brief enumeration follows, if only to establish a proper order of magnitude. On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids. Over a period of perhaps three years, he distributed small quantities of heroin to informants He also took money, and occasionally, heroin, from informants in exchange for letting them continue to sell narcotics. He sold information that had been gleaned from police investigations and acted as an intermediary for other policemen who wished to make similar sales.[7] He participated in illegal electronic surveillance on several occasions. He accepted sums of money from lawyers and, on one

[7] He has now confessed to acting in this intermediary role on occasions other than those about which he testified at the *Rosner* trial.

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occasion, participated in the paying of a bribe to an Assistant District Attorney. He made payments of money to his superior officers in the Police Department. And finally, it is almost supererogatory to add that he committed perjury at the *Rosner* trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers.[8]

Rosner's new trial motion, however, is not premised merely on Leuci's perjury. He points to various incidents which, he claims, demonstrate either that government prosecutors were aware of Leuci's perjury regarding his past crimes or that they withheld evidence of such crimes from the defense prior to and after the trial. I shall recount each of these very briefly.

The first act of alleged suppression took place in 1971, before Leuci began working with the United States Attorney's Office here. Leuci had been with the Knapp Commission, where he developed a rapport with one of the Commission's lawyers, Nicholas Scoppetta.[9] In March of that year Scoppetta ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following

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[8] I have avoided estimating the financial gains derived from any of these activities, for Leuci's recollection was poor in this respect, but there can be little doubt that he realized at the very least tens of thousands of dollars.

[9] Scoppetta went from the Knapp Commission to the United States Attorney's Office in mid 1971 and, it appears, took Leuci with him.

arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money. The conversation, whose most significant passage is set out in the margin [10] is neither as unequivocally incul-

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[10] "Leuci: You know, the story with you is always the same story. Now, let me explain something. The easiest way for you to get a package is to make a case, right?

Lawrence: Make a case?

Leuci: Yeah. Am I right or wrong?

Lawrence: No, no, no. How the hell am I gonna . . . here the hell is that gonna work?

Leuci: Oh, come on. What are you talkin' about?

Lawrence: What do you mean so . . . so . . . what do you . . . what do you mean? How the hell is . . . how is that gonna work?

Leuci: If you make a case.

Lawrence: Yeah.

Leuci: And there's a seizure.

Lawrence: Yeah.

Leuci: You got a piece of the package, right?

Lawrence: No. Not necessarily. How . . . how do you figure that?

Leuci: Have we ever made a case where you didn't get a piece of the package?

Lawrence: Have we ever made a case that I didn't get a piece of the package? Oh, man, I don't know what the hell you talkin' about. Have we ever made a case that I didn't get a piece of the pack. . .? Hell, we've made a whole lot of cases that I didn't get a piece of the package. I don't know what the hell you talkin" about. Shit! That . . . that . . . that . . . if that was the case, I'd 've been straight now. But . . . have we made a case and I get a piece of the package. . .

Leuci: No. I'm not talkin' . . . you know.

Lawrence: I'd be sittin' on the top of the world.

[Footnote continued on following page]

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patory as Rosner claims nor as exculpatory as the government argues. There is no question, however, but that during the course of it Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain "packages" of heroin resulting from arrests. Leuci told Scoppetta of this conversation and Scoppetta subsequently listened to the tape, which he took with him when he joined the staff of the United States Attorney. The tape was, however, not disclosed to the defense prior to the trial, and only came to light during the final days of the instant hearing, when Leuci made an inadvertent reference to it.

Rosner alleges one other instance of governmental suppression. On July 13, 1972 Leuci was interviewed in the offices of the United States Attorney by two agents of the

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Leuci: Yeah, right. But we really never made, you know, like when we were fallin' over fuckin' packages.

Lawrence: Right.

Leuci: You know, I agree with you there.

Lawrence: Right.

Leuci: But, I . . . I would think that the easiest way to go up and you know, you make it understood before you make the case. Look, I'm gonna make this case. We're gonna do something. Whoever you've workin' with. With whoever you've workin' with. So it takes you four days to make . . . whatever bullshit case . . . like you to get a guy with a eighth half, whatever.

Leuci: It is. (1 secs/unintell.) and you get your hands on something . . . three owners, four owners, and you're home free. Right.

Lawrence: No man. You can't do things like that.

Leuci: Don't you tell me you can't do things like that.

Lawrence: You can't do things like that.

Leuci: Well. I don't know."

Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 or 1965 he had participated in a warrantless search for drugs along with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum". Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. The Goe memorandum, which the government concedes to have been "3500 material",[11] was not turned over to the defense prior to trial. None of the government prosecutors who participated in the *Rosner* trial was aware of it until April 9, 1974, when Elliot Sagor, one of the prosecutors, learned of it.

Rosner presents four separate arguments concerning alleged governmental misconduct prior and during the trial. (Two other arguments, claiming *post* trial suppression, will be considered in later sections of this opinion.) First, he argues that Leuci's perjury, in and of itself, was so extensive, and presented such a distorted picture of the man to the jury, that a new trial is required. Second, he argues that Leuci's status as a government agent and as an integral part of the prosecution require that his own awareness of his perjury be attributable to the government, and that the case be viewed as if there were governmntal knowledge of the perjury. Third, he argues that governmental knowledge of perjury is further established by Shaw's awareness of the Goe memorandum and Scoppetta's familiarity with the Leuci-Lawrence taped conversation. The fourth argument is in effect a restatement of

[11] Government's Post-Hearing Memorandum of Law, p. 25.

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the third: it is contended that Shaw and Scoppetta suppressed evidence of Leuci's crime in the Goe and Lawrence incidents, and therefore materially impeded the preparation of the defense.

Before considering each of these arguments in turn, it will be useful to review the various standards that have been applied in evaluating motions for a new trial based on newly discovered evidence. The general standard is now a familiar one: "the evidence must have been discoverd aftr trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict in the event of a retrial." *United States* v. *Kahn*, 472 F.2d 272 (2d Cir. 1973); *United States* v. *DeSapio*, 456 F.2d 644 (2d Cir. 1972); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969).

Where the evidence newly discovered demonstrates perjury by a prosecution witness, the standard is, in some respects, altered. A distinction, however, must be drawn between perjury known to the government and perjury of which the government was unaware. If the government was unaware of the perjury, the applicable standard is the traditional one just enunciated. Although *United States* v. *Polisi, supra*, suggests a more liberal standard, I think Judge Weinfeld is surely correct in concluding that a relaxation of the traditional newly discovered evidence test is justified only where government knowledge of the perjury can be established. *United States* v. *Marquez*, 363 F. Supp. 802 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2d Cir. 1974). Where such knowledge is established, the test is relaxed in two respects. First, the newly discovered evidence need not be material to guilt or innocence alone; it may pertain solely to the credibility of a witness. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *United States*, 405 U.S. 150 (1972). Second, the defen-

dant need establish only that the newly discovered evidence *might* have produced a different verdict. *United States* v. *Marquez, supra; Giglio* v. *United States, supra; Kyle* v. *United States,* 297 F.2d 507 (2d Cir. 1961); *Larrison* v. *United States,* 24 F.2d 82 (7th Cir. 1928).

Yet a different set of standards is applicable when it is determined that the newly discovered evidence was suppressed by the prosecution. Those standards were first articulated by Judge Friendly in *United States* v. *Keogh,* 391 F.2d 138 (2d Cir. 1968), and reaffirmed in *United States* v. *Kahn, supra.* In such a case of intentional suppression, a new trial is warranted if the evidence is merely material or favorable to the defense. The same standard applies even in the absence of intentional suppression, "if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention." The *Kahn* court notes that materiality is defined "by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict."[12] The defendant has a heavier burden where the evidence was inadvertently suppressed, and where its value is not so readily apparent. Under such circumstances, the defendant need not show the probability of a different verdict upon retrial, but must demonstrate that there is "a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Miller,* 411 F.2d 825 (2d Cir. 1969); *United States* v. *Mayersohn,* 452 F.2d 521 (2d Cir. 1971); *United States* v. *Kahn. supra.*

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[12] This standard of materiality thus contrasts with that applicable in cases of governmental knowledge of perjury, where the focus of the court's inquiry is the effect on the jury, not on defense preparation.

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II.

I shall first consider defendant's allegations of governmental suppression of the evidence in the Goe memorandum and of the Leuci-Lawrence tape. I should note preliminarily that the defendant is surely correct in arguing that the acts in question are attributable to the government. The fact that neither Scoppetta nor Shaw directly participated in the *Rosner* trial is immaterial; it is now settled law that the misdeeds of one member of a prosecutor's office are attributable to the prosecution as a whole. *Giglio* v. *United States, supra; Santobello* v. *New York,* 404 U.S. 257 (1971); *United States ex rel. Rice* v. *Vincent,* 491 F.2d 1326 (2d Cir. 1974). But my finding need not be based on this abstract proposition alone, for I must also conclude that both Shaw and Scoppetta were deeply involved in the preparation of the *Rosner* case. The two men were given primary responsibility for gathering and disclosing to the defense all "3500 material". Shaw also presented the case to the grand jury and, although by the time of trial he had left the United States Attorney's Office to become head of the Southern District's Strike Force, he was the government's first witness and by his own admission followed the trial closely.

A. Using the *Kahn* test, I shall attempt to evaluate the government's actions with regard to the Goe memorandum and the Leuci-Lawrence tape separately. Taking the Goe memorandum first, I find that Shaw's actions fall far short of the first of the *Kahn* categories: there was certainly no deliberate and carefully considered decision to suppress the information, and I do not understand even the defendant so to contend. The next inquiry, then, is whether the evidence was of such "high value" that it "could not have escaped the prosecutor's attention". Quite the opposite

appears to me to be the case. It describes, in essence, the participation by Leuci in an illegal entry and a $50 theft, crimes which pale in significance as against those to which he testified at trial. It will be recalled that Leuci admitted participation in shakedowns of narcotics suspects which earned him thousands of dollars. The government prosecutors thus knew, long before the *Rosner* trial, that Leuci's record was marred by *serious* criminal activities. The $50 incident described in the Goe memorandum was thus not likely to stand out in anyone's mind as an egregious example of wrongdoing that undermined firmly held assumptions about Leuci's probity. Had this incident been the only blot in an otherwise immaculate record, then I could well find that its value was such that it could not have escaped a diligent prosecutor's attention.

The defendant, however, argues that the Goe memorandum has a far greater significance than I have suggested. The crime described therein, he argues, was wholly different from those to which Leuci confessed at the trial. As he puts it, "The four incidents in which Leuci was an intermediary in information sales were at *most* victimless crimes in which Leuci's participation was beneficial to all parties. In sharp contrast, the Goe crime involved a *victim* whose home was burglarized and who lost $200 to the thieves in government uniforms, gaining nothing in return."[13] (Emphasis in original). The argument is staggeringly disingenuous.[14] My task here, however, is not to weigh the

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[13] Defendant's Memorandum of Law, pp. 20-21.

[14] The argument takes the notion of "victimless crimes", a term developed by criminologists to define a class of activities, such as homosexuality or the distribution of pornography, defined as criminal largely because of prevailing moral standards, and extends it to any crime in which, presumably, there is no complaining witness. By this logic, tax evasion, perjury, bribery or obstruction of justice are all victimless crimes and, one supposes, less offensive to the sensibilities of juries than assault and battery.

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stigma attaching to various classes of felonies but to determine whether the incident described in the Goe memorandum was of such significance that it should have attracted the attention of any conscientious prosecutor. Seen against the background of those other crimes to which Leuci has confessed, it had no real significance and was, as I stated at the hearing, *de minimis*.

Having found the suppresion to be inadvertent, and having found the evidence to be of no conspicuous value, I thus reach the third element of the *Kahn* test: was there a "significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."? I think not, and my reasons for so concluding go directly to the basic weakness of each of Rosner's proffered arguments. The unstated premise of this motion, in all its facets, is that if the *Rosner* jury had known of Leuci's other criminal activities, whether the Goe incident, the Lawrence conversation, or even the entire panoply of his crimes, his credibility would have been so severely undermined that a different verdict would have been inevitable. I cannot share this view of the evidence or of the jury's perspicacity. The trial was not a simple matching of Leuci's credibility against Rosner's; had it been, the arguments the defendant now advances would have infinitely greater persuasive force. The government's case was based on Leuci's testimony, as corroborated by several tape recordings of conversations in which Leuci and Rosner, among others, participated. Leuci was not the lynchpin of the government's case; the tapes were. Nothing demonstrates this more forcefully than the verdict itself. The two acts of bribery of which Rosner was acquitted took place on days when Leuci wore no transmitting device; the three acts of bribery of which he was convicted took place while conversations

were recorded. Although jury verdicts are rarely unambiguous, the inference is inescapable that the jury attached great weight to the existence of tape recordings. The verdict also makes clear that Leuci's credibility did not simply carry the day for the prosecution, as the defendant would now have us believe.

Further corroboration of Leuci's account, furthermore, was provided by the testimony of the defendant himself. In the course of establishing his entrapment defense Rosner admitted virtually all of the elements of the various crimes charged. He admitted evincing interest in the grand jury minutes and "3500 material", and he admitted making payments for them. I therefore find that no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected. It follows that the incident described in the Goe memorandum, no matter how eloquently presented to the *Rosner* jury, could not have, in the words of the *Kahn* test "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

B. Turning to the Leuci-Lawrence tape, I again find no evidence of deliberate, considered suppression. Scoppetta stated, in testimony I find wholly credible, that when he heard the tape his principle concern was the homicide that he had asked Leuci to investigate. Because the conversation was quite uninformative on that point, he paid it little attention thereafter. Although the tape remained in a locked cabinet in the United States Attorney's Office, there is nothing before me that suggests that the tape was withheld prior to trial because of its references to narcotics transactions involving Leuci.

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The question of whether the tape had such value as to arrest the attention of a conscientious prosecutor is slightly closer. It would be close indeed if the conversation it contains establishes Leuci's criminality as authoritatively as Rosner argues. It is, however, a peculiar and ambiguous document. The passage set out at footnote 10, *supra,* can be read in various ways. Leuci's question to Lawrence, "Have we ever made a case where you didn't get a piece of the package?" suggests that he participated in narcotics arrests in which Lawrence was permitted to keep a portion of the drugs. Lawrence's incredulous response to this question, "Hell, we've made a whole lot of cases that I didn't get a piece of the package", is open to two interpretations. It may suggest, as the government urges, that Lawrence never took drugs while Leuci was making an arrest. It may also suggest that on many occasions Lawrence obtained no drugs, but on others he did. We now know from Leuci's testimony at the instant hearing that on two occasions he permitted Lawrence to take drugs in the course of an arrest. But even a diligent prosecutor reviewing the conversation could reasonably conclude that the conversation shows no more than a streetwise policeman's familiarity with the manner in which narcotics informants obtain drugs. The tape, in short, does not shriek of Leuci's criminality, and its dubious value could readily have escaped a prosecutor's attention.

Because of the conversation's ambiguity, I would also not be warranted in concluding that it could have induced a reasonable doubt sufficient to avoid conviction, no matter how skillfully exploited by Rosner's lawyers. Standing alone, its probative force is minimal. Even if, as defendant argues, the pretrial disclosure of the tape would have led to Lawrence, and thence to the two incidents Leuci has now admitted, the effect on the jury would have been insignificant. As the Judge who presided over the trial and

carefully observed its course and conduct, I do not believe that a diminution in Leuci's credibility would have been fatal to the government's case. I am therefore compelled to reject that branch of defendant's motion based on alleged suppression of evidence by the prosecution.

III.

Closely related to the discussion in the preceding section is defendant's contention that a new trial is mandated by the prosecution's knowledge of Leuci's perjury. The essence of this argument is that while Leuci was denying all criminal acts save the four to which he testified, Shaw was aware of the incident described in the Goe memorandum and Scoppetta of the implications of the Leuci-Lawrence tape. As I indicated at the outset of the preceding section, Shaw and Scoppetta's knowledge must be attributed to the prosecution. *Giglio* v. *United States, supra; Santobello* v. *New York, supra.*

On this branch of the motion, it is well to remember that the prosecution can be held responsible for knowledge only of the Goe memorandum and the Lawrence tape. With regard to the latter, I shall simply assume *arguendo* that an awareness of this conversation bespeaks a knowledge of Leuci's narcotics dealings with Lawrence; in actuality, a prosecutor fully aware of this conversation could reasonably have seen no inconsistency between it and Leuci's trial testimony. The question then comes down to this: is the government's awareness of Leuci's failure to acknowledge these few criminal acts sufficient to warrant a new trial? I think not. The applicable standard has already been set forth: might this evidence, newly revealed, have led to a different verdict? We have been cautioned by the Supreme Court in *Giglio* that a new trial is not

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required whenever "a combing of the prosecutor's files after the trial has disclosed evidence possibly usely to the defense but not likely to have changed the verdict." See *United States* v. *Keogh, supra.* "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" (Citing *Napue* v. *Illinois, supra.*) As I have already stated in considering Rosner's suppression argument, there is not the slightest likelihood that the jury, having been apprised of the Goe incident and the transactions with Lawrence, would have reached a different verdict. This branch of the motion is denied as well.

IV.

I turn now to that aspect of Rosner's argument that focuses not on the knowledge of the prosecutors, but on Leuci's own awareness of his perjury. The United States Atorney's Office, as I have noted, can only be charged with the awareness of those incidents which are the subject of the Goe memorandum and the Lawrence tape; Leuci, of course, was the only one who knew exactly how flagrant his perjury was.

There is no need to dwell at length on defendant's argument that the "massive" nature of Leuci's perjury, in and of itself, requires a new trial. It reflects a misunderstanding of the applicable law governing new trial motions. I have previously noted my agreement with Judge Weinfeld's conclusion in *United States* v. *Marquez, supra,* that the more relaxed standard governing new trial motions alleging perjury applies only where governmental knowledge of the perjury can be established. 363 F. Supp. at 805-6. Hence the appropriate test to be applied is that which governs new trial motions in general, and the second

element of that test is that the evidence be material to the factual issues at the trial and not merely cumulative and impeaching. *United States* v. *Kahn*, *supra*. The evidence newly discovered here, regardless of its extent, only serves to impeach Leuci's credibility. It does not address the question of defendant's guilt or innocence. It cannot therefore furnish a basis for a new trial motion. I see no justification here for departing from the rule that a witness's perjury regarding collateral matters cannot, by itself, warrant a new trial.[15]

B. The defendant, however, proffers an alternative theory based on Leuci's perjury. He invokes a line of authority commencing with *Pyle* v. *Kansas*, 317 U.S. 213 (1942), that holds the government answerable for perjurious testimony given or induced by police officers even without the knowledge of government prosecutors. As Judge Sobeloff stated in *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964), "[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney were guilty of the nondisclosure."

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[15] In support of a contrary view Rosner cites *United States* v. *Gordon*, 246 F. Supp. 522 (D.D.C. 1965). It was there discovered that the government's complaining witness had been convicted of larceny after denying so at the trial. In considering a new trial motion the district court acknowledged the ordinary rule that newly discovered evidence affecting a witness's credibility will not warrant a new trial. The court felt compelled to depart from the rule, however, and granted the motion. The case is readily distinguishable: the court noted that the new impeaching evidence was of a "very serious nature under the circumstances of this case, there being no corroboration and no eye witnesses." Here, of course, Leuci's testimony was thoroughly corroborated by the tape recordings as well as Rosner's own testimony at trial; the verdict thus cannot be said to have hinged on his credibility, as the court concluded it did in *Gordon*.

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See also, *Curran* v. *State of Delaware*, 259 F.2d 707 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959); *Smith* v. *State of Florida*, 410 F.2d 1349 (5th Cir. 1969); *Imbler* v. *Craven*, 293 F. Supp. 795 (C.D. Cal. 1969). Rosner therefore argues that Leuci was such an integral part of the prosecution team that the whole of his perjury must be chargeable to the government. The government can thus be deemed to have wilfully and knowingly suppressed not merely a few random incidents but the entirety of his criminal past. Under the more lenient standard for new trial motions based on government knowledge of perjury, he argues, a new trial is required.

I do not for a moment quarrel with the principle announced in *Pyle*, *Barbee*, and the other cases cited, but I do not consider it to be fully applicable here. Leuci was of course a part of the prosecution team in that although a New York City policeman, he was working full time under the supervision of the United States Attorney's Office. But he was not a "part of the prosecution" in quite the same sense that the officers in, for example, *Pyle*, *Curran*, or *Barbee* were. The policemen in those cases actively engaged in investigating and preparing the cases in question for trial; their functions were ancillary to, and supportive of, the prosecutors. Leuci's role here differs significantly. His status as a policeman was incidental; he functioned not as a policeman but as an undercover agent whose utility to the prosecution was enhanced because his pose as a corrupt policeman made the role he had to play more credible. He did not, obviously, participate in the investigation of this case or in its preparation for trial except insofar as he was a witness to the events in question. I point out these differences only to stress that the perjury or falsification in which the police engaged in *Curran*, *Barbee*, etc. was committed in the course of per-

forming prosecutorial functions. In *Curran* policeman destroyed statements given them by defendants which, if offered in evidence, would have substantiated one of their defenses. In *Barbee* the police suppressed ballistics reports which tended to show that defendant's weapon was not used to commit the crime of which he was charged. In so doing these policemen abused their prosecutorial function. Leuci's perjury, on the other hand, was not committed in the course of his functioning as a prosecutor; he lied about his criminal past just as any other witness similarly situated might have.

There is another point of distinction between the instant situation and the cases on which Rosner relies. In the latter, the perjury or suppression committed by police officers concerned issues relating to the ultimate question of guilt or innocence. Leuci's perjury, as I have now repeatedly noted, went only to the issue of his own credibility. There is no sound policy reason, I submit, to extend the principle of these cases to acts of perjury committed by policemen which affect only their own credibility. To hold the government answerable for the suppression of evidence by its subordinates serves a salutary deterrent function; it requires all those who participate in a prosecution to sift through the evidence with greater care and to supervise the work of their subordinates with greater vigilance. It is difficult to see what deterrent function is served by holding the government answerable for perjury on such collateral matters: no degree of supervision by a prosecutor is likely to protect a policeman from lying about his criminal activities, but close supervision is likely to prevent the falsification or suppression of other evidence. I therefore decline to attribute Leuci's knowledge of his perjury to the government here, or to extend the *Pyle* principle in the fashion defendant now urges.

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There is an alternative basis for my ruling. Even if Leuci's perjury is fully attributable to the government, and even if the proper test for analyzing its effect was whether the jury *might* have reached a different result, I would be compelled to deny this branch of the motion. I adhere to my conclusion, set forth in Part II of this opinion, that Leuci's credibility was not the crux of the government's case. The jury had before it the very best evidence of Rosner's criminality—the record of his own voice and words and their intonation made in the midst of his criminal activities. Thus, even had the jury been fully apprised of Leuci's criminal background and his credibility diminished accordingly, I see no reasonable likelihood of a different jury verdict. For the tape recordings spoke far more decisively of Rosner's guilt than Leuci did.

V.

The foregoing discussion disposes of defendant's various claims of pretrial suppression and perjury. I now turn to his charges of post-trial suppression. The first of these alleged acts of suppression took place in January, 1973, a month after the trial had concluded. In late December, 1972, Lawrence went to the office of Frank Rogers, the Special Assistant District Attorney in charge of narcotics prosecutions in New York City and informed him that he had often been given narcotics by Leuci. Rogers communicated this information to the United States Attorney's Office. Robert Morvillo, then hea dof the Criminal Division and the government's chief trial lawyer in the *Rosner* case commenced an investigation of those charges on or about January 2, 1973. The investigation was entrusted to Charles Sherman, an agent with the Drug Enforcement Administration. Sherman and a subordinate interviewed

Lawrence and were told of the many narcotics transactions in which he claimed to have participated with Leuci. Lawrence mentioned various individuals who were also party to these transactions: one named John, another named Robert, another named "Saint". Lawrence did not know the full names, addresses, or telephone numbers of any of these individuals, and DEA agents were unable to locate any of them in the ensuing weeks with the information he did provide. Lawrence was also given a lie detector test which, according to the concern which administered it, he failed. Morvillo was told of the results of the test on January 18, 1973 and decided to abandon any further investigation into Lawrence's allegations during the week of January 21.

While this investigation was underway, Rosner filed his first new trial motion, which was based on the affidavits of several narcotics addicts alleging that Leuci had sold them drugs. The motion was filed on January 12 and a hearing was held on January 26, after which I denied the motion from the bench. At no time during the pendency of this motion did the government inform Rosner of Lawrence's allegations.

Rosner now argues that the government was obligated to disclose Lawrence's allegations to him. He contends further that the government's supposed investigation of the charges was inadequate, and that had greater pains been taken Lawrence's allegations could have been substantiated. He also introduced several experts who testified that Lawrence's polygraph test was at worst inconclusive and could by no means have been adjudged a failure. All of these derelictions, he argues, are sufficiently serious as to justify a new trial.

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In considering this contention I do not find it necessary to pass on the adequacy of the government's investigation of Lawrence's allegations. I shall note, however, that an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant. On the other hand, the prosecutors could not help but recognize the similarity between Lawrences' charges and those contained in the affidavits submitted in support of Rosner's motion; they should thus have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion.

But even so, I fail to see how it could avail Rosner. The simple fact is that he was in no way prejudiced. All that resulted was the denial of a new trial motion; Rosner has now had another opportunity to move for a new trial, and to include in such motion all of the charges of what the government failed to apprise him in January, 1973.[16] The absence of prejudice can best be demonstrated by comparing a motion based on post-trial suppression to one based on pre-trial suppression. In the latter circumstance, the court inquires into the effect of such suppressed evidence on the jury's verdict. If the court deems the effect sufficiently substantial, a new trial is ordered. Where post-trial suppression is alleged however, the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made. Thus the most Rosner would be entitled to on this branch of the motion is a finding that my decision on his first new trial motion might have been affected by the new evidence, and my affording

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[16] It should be noted also that Rosner has remained free on bail pending appeal since the jury's verdict in December, 1972.

him another opportunity to move for a new trial. In the hearing on his most recent motion, he has been given that opportunity. (I have of course dealt elsewhere in this opinion with the Leuci-Lawrence drug transactions, and have found them insufficient to warrant the granting of a new trial.

I should note in concluding this branch of my discussion that the defendant's failure to call Lawrence to testify scarcely bespeaks unbounded confidence in the quality of his testimony. It also tends to undermine the defense contention that Lawrence's information was of such singular value that the government prosecutors should have investigated it more thoroughly. Finding no prejudice to the defendant in any suppression of such information, I am constrained to deny this aspect of his motion.

VI.

Rosner's other claim of post-trial suppression concerns the Goe memorandum, whose contents have already been discussed. As I have noted, it appears that Shaw was the only government prosecutor aware of the Goe memorandum during the *Rosner* trial. On or about April 8, 1974, the memorandum came to the attention of Elliot Sagor, an Assistant United States Attorney who has been involved with the *Rosner* case from its very inception. At this time, of course, Rosner's petition for certiorari was pending in the Supreme Court and the instant new trial motion had been filed in this court. Upon reading the document Sagor realized "that the Goe memorandum, if true, and if in government possession and known to the government at the time, was a document which should have been turned over to defense counsel at the time of trial."[17] Shortly

[17] Hearing transcript, p. 593.

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thereafter, on April 17, 1974, Leuci admitted to government prosecutors the full range of his past criminal activities. There then commenced consultations among various members of the United States Attorney's Office regarding when and whether the Supreme Court should be apprised of these revelations.

On April 30, 1974 John D. Gordon III, the Assistant United States Attorney in charge of appeals, called Andrew Frey of the Solicitor General's office and informed him of the nature of Leuci's perjury at the Rosner trial. The Solicitor General then wrote to the Clerk of the Supreme Court requesting that consideration of the *Rosner* certiorari petition be postponed until a supplemental brief could be filed. Members of the United States Attorney's Office reviewed a draft of the brief before the Solicitor General submitted it in mid-May. The brief stated that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matter raised by the defense in an effort to impeach his credibility", but did not review in detail Leuci's recent admissions of criminal conduct.

The essence of Rosner's argument on this point is that the United States Attorney's Office withheld from the Solicitor General and thereby from the Supreme Court any mention of the Goe memorandum. This suppression, he contends, was considered and deliberate, and now warrants the granting of the relief sought from the Supreme Court: a new trial.

Again, however, I see no prejudice to Rosner from the government's omission. The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I there-

fore fail to see how the addition of a single minor item to the list of Leuci's sins could have produced a different result in that Court. Whether I am right or wrong in this conclusion is beside the point, for the Court may well have another opportunity to pass on Rosner's contentions. And therein lies the weakness of his argument. The Supreme Court denied the petition for certiorari without prejudice to this court's consideration of the instant motion. By implication, then, the Court deferred consideration of all claims arising from this motion. Rosner has since had the fullest opportunity to explore in this court the significance of the Goe memorandum, and he will have equal opportunity to present it on appeal. I therefore find no prejudice to him in the government's decision to withhold the Goe memorandum, and this branch of his motion is also denied.[18]

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[18]In argument presented to this court Rosner has repeatedly stressed the parallels between the instant situation and that facing the Supreme Court in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). As I understand it, he argues that if he had been able to present the incident described in the Goe memorandum to the Court, it would have *sua sponte* ordered a new trial as it did in *Mesarosh*. This argument cannot withstand serious scrutiny.

In *Mesarosh*, a Smith Act prosecution, the Solicitor General stated to the Court his belief that the principal government witness had committed perjury in other proceedings. In these proceedings he had made extensive accusations of Communist activity similar to those he had made against the defendant in *Mesarosh*. The Solicitor General maintained that the witness's trial testimony was truthful, but moved to remand the case for a hearing into the extent of his perjury. The Court instead ordered a new trial.

Rosner suggests that the Court might have followed a similar procedure here. This argument overlooks the Court's concession that newly discovered evidence that merely impeaches the credibility of a government witness is not an adequate basis for a new trial motion. 352 U.S. at 9. Underlying the Court's opinion in *Mesarosh* is the assumption that the witness, having falsely accused others, may well have falsely accused the defendant. Hence the witness's perjury was material to the ultimate question of guilt or innocence. It is not in the instant action.

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CONCLUSION

For the reasons stated above, Rosner's motion for a new trial is denied in all respects.[19] It is proper to add in concluding a word regarding the nature of the arguments presented here. The spectacular quality of Leuci's revelations of criminal conduct has at times obscured its minimal relevance to the issues before me. None of Leuci's perjury has the slightest bearing on the question of Rosner's guilt or innocence of the charges contained in the instant indictment. His perjury, nevertheless, would be a matter of serious concern if his credibility had been crucial to the jury's determinations. As I have now noted several times, it was not. The tape recordings and, indeed, the admissions contained in Rosner's direct testimony at trial were the conclusive evidence upon which his conviction was based. Leuci's crimes, reprehensible as they are, cannot alter that fact. The motion is denied.

IT IS SO ORDERED.

Dated: August 15, 1974

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U.S.D.J.

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[19] On August 6, 1974 Rosner's counsel informed this court, by letter, of his intention to "interview those jurors who are willing to be questioned as to whether the recent Leuci disclosures would have affected their decision". In response thereto, the government sought an order enjoining a post-trial inquiry of the jury and Rosner agreed that no interviews would be conducted pending this court's determination as to the propriety thereof. In view of my final disposition of the new trial motion I now consider the issue to be moot and accordingly, decline to rule on the government's request.

Rosner has, in no way, been prejudiced by his inability to interview the discharged jurors. While a new trial motion clearly turns on the effect of newly discovered evidence on the jury's decision, "the question is to be determined . . . on its probable effect on a *hypothetical* average jury". *United States* v. *Crosby*, 294 F.2d 928 (2d Cir. 1961) [Emphasis added].

If in fact Rosner is proposing a hearing at which his trial jurors would testify as to what they "would" or "might" have done two years earlier had they known about Leuci's activities he proposes a procedure that can have no useful result. It is, it seems to me, another imaginative effort to frustrate the purpose of all trials—to find the truth.

APPENDIX B

Opinion of Court of Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND ROSNER,

Appellant.

No. 523, Docket 74-2290.
United States Court of Appeals,
Second Circuit.
Argued Dec. 18, 1974.
Decided April 29, 1975.

Appeal from an order of the District Court for the Southern District of New York, Arnold Bauman, J., denying defendant's motion for a new trial. The Court of Appeals, Gurfein, Circuit Judge, affirmed the district court's finding that the government's failure to supply the defendant with two items of evidence useful for impeaching a government witness was inadvertent and its holding that the inadvertent suppression did not warrant granting defendant a new trial. The court also held that the witness' perjury concerning his own past misconduct of a cumulative impeaching nature was neither attributable to the government nor so crucial to the issues in the case as to require a retrial.

Affirmed.

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Appendix B—Opinion of Court of Appeals

1. Criminal Law—940

If government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if evidence is merely material or favorable to the defense.

2. Criminal Law—945(1)

When government's failure to disclose evidence favorable to defense is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in minds of enough jurors to avoid a conviction.

3. Criminal Law—956(4)

In proceeding on motion for new trial, evidence sustained finding that government's failure to supply defendant with two items of evidence, which could have been useful for impeaching a government witness, was not deliberate.

4. Criminal Law—956(4)

In proceeding on motion for new trial, evidence, including finding that tapes, and not government witness, were linchpin of government's case, indicated that additional evidence, inadvertently suppressed by government, which tended further to impeach credibility of government witness, would not have so altered a juror's perception of government witness's credibility as to induce a reasonable doubt of defendant's guilt on basis that he had been entrapped. Fed. Rules Crim. Proc. rule 33, 18 U.S.C.A.

5. Criminal Law—942(1)

Perjury by a government witness, unknown to the prosecution, does not ordinarily compel the application of standards for a new trial required in cases of government misconduct.

6. Criminal Law—942(1)

Fact that undercover agent, without knowledge of prosecution, committed perjury on a purely collateral matter affecting his own credibility did not entitle defendant to a new trial. Fed. Rules Crim. Proc. rule 33, 18 U.S.C.A.

7. Criminal Law—938(1)

Suppression by police of evidence may be enough to warrant a new trial, even though prosecutor lacks knowledge about suppression of evidence.

8. Criminal Law—942(1)

Circumstance that undercover witness was an investigative informant rather than an investigator with authority to arrest in that status or to direct investigations, that government could not have known witness' secret past, that matters about which witness lied did not concern any consideration promised him and that perjury involved solely witness' own misconduct in other situations required conclusion, on motion for new trial, that witness' perjury should not be attributed to prosecution and was required to be measured by standards applicable to government witnesses generally.

9. Criminal Law—700, 941(1)

Prosecution erred when it failed to notify defendant after trial about evidence relating to credibility of government witness, where such evidence fitted into very pattern

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of conduct suggested by defendant's motion for new trial, but prosecutor's failure to disclose was not prejudicial, since such evidence was cumulative and was ultimately developed at a subsequent new trial hearing.

10. Criminal Law—1165(1)

Failure of government to specifically tell United States Supreme Court, hearing case on certiorari, about memorandum concerning past misconduct of government witness as evidence of government's knowledge of such memorandum during trial was not prejudicial, where Supreme Court, in its denial of certiorari, specifically preserved new trial motion for hearing on basis of solicitor general's disclosure.

Alan Dershowitz, Cambridge, Mass. (Nancy Rosner, New York City, Jeanne Baker, Boston, Mass., of counsel; Marc Dorfman and Ann Greenblatt, law students, on the brief), for appellant.

Elliot G. Sagor, Asst. U. S. Atty., New York City (Paul J. Curran, U. S. Atty. for S. D. N. Y., Jeffrey I. Glekel and John D. Gordan, III, Asst. U. S. Attys., of counsel), for appellee.

Before FRIENDLY, TIMBERS and GURFEIN, Circuit Judges.

GURFEIN, Circuit Judge:

Robert Leuci, a corrupt New York City police officer, acted in an undercover capacity for the United States Attorney for the Southern District of New York. In that capacity he obtained evidence and testified against Edmund Rosner, a lawyer, who was convicted of bribery, obstruction of justice and conspiracy on December 5, 1972. After the conviction had been affirmed by this court, United States

v. Rosner, 485 F.2d 1213 (2 Cir. 1973), and while a petition for certiorari was pending, appellant Rosner filed a motion for a new trial on March 19, 1974 on the ground of newly discovered evidence to the effect that Leuci had lied at the trial concerning the extent of his own past criminal misconduct. F.R.Cr.P. 33. At the trial, Leuci had admitted his complicity in corrupt dealings on four separate occasions with criminal defendants or subjects of investigation, but had denied any other such involvement. He had testified frankly that he did not expect to be prosecuted.

The thrust of the new trial motion was that Leuci had furnished narcotics to informants and others, acts which he had denied at trial. During the pendency of the motion on April 17, 1974 Leuci admitted to the United States Attorney's office that he had committed many acts of criminal misconduct in addition to those he had revealed at trial, among them furnishing narcotics on two occasions to an informant, Richard Lawrence.

On June 10, 1974, after being informed by the Solicitor General that Leuci had perjured himself in concealing additional criminal activities, the Supreme Court denied certiorari without prejudice to consideration by the District Court of the motion for a new trial. Rosner v. United States, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974). Judge Arnold Bauman held a hearing, thereafter, in July 1974, and, in an opinion dated August 15, 1974, denied the motion for a new trial.[1] This appeal followed. The

[1] On August 16, 1974, Judge Wyatt, to whom sentencing had been transferred, resentenced appellant to concurrent terms of three years on each count.

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primary issue posed is whether evidence solely of an impeaching nature that an important government witness had in fact committed crimes which at trial he denied committing requires us to order a new trial.

A second, related issue is also presented. Rosner contends that the government prosecutors were aware of two specific pieces of evidence tending to implicate Leuci in criminal activity, evidence which they did not turn over to the defense before trial and which, if turned over to the defense, would have been useful for impeaching Leuci's credibility. He also contends that the prosecution withheld this evidence and additional impeachment evidence which came to light *after* trial, during the pendency of appellant's new trial motion.

To understand the issues presented by this appeal, it is necessary to advert briefly to the facts proved at trial.

In October 1971 Rosner was under indictment along with Nicholas DeStefano in a case charging subornation of perjury. Leuci, acting in an undercover capacity, approached DeStefano and Nicholas Lamattina and offered to provide through a supposed contact in the United States Attorney's office information about cases pending in the District. The matter of the Rosner indictment came up first during a meeting of Leuci, DeStefano and Dominick Marcone, another target of investigation, on September 30th.

Rosner eventually came into the negotiations and participated in the payment of several thousand dollars to Leuci in exchange for the statements of prospective witnesses and grand jury minutes in his case. There were five alleged separate payments over a period of three weeks,

each of which formed the basis of a bribery charge. Rosner was acquitted on two of these charges relating to payments occurring on October 4th and October 8th and was convicted of three others which involved payments occurring on October 12, 13 and 19. He was also convicted of conspiracy and obstruction of justice. Leuci testified for the government. It is agreed that he met Rosner five times. Recordings were made of the meetings on October 13th, 15th and 19th on a tape recorder concealed on the person of Leuci. The earlier meetings of October 4th and 8th were not tape recorded.

Rosner took the stand at his trial, and admitted that he had made the payments alleged on three occasions and that he had received the witnesses' statements and the grand jury minutes, as alleged, but he contended that he had been entrapped. DeStefano and Lamattina pleaded guilty just before the trial began, but neither was called as a witness by either side. There is no doubt that Leuci perjured himself on the extent of his own past misconduct during his years on the police force.

I.

Although appellant does not claim that the government actually knew before trial the extent of Leuci's criminal activities, he does contend that there were two specific items of evidence in the possession of the government that should have been disclosed to the defense. One was the so-called Leuci-Lawrence tape and the other the so-called Goe Memorandum.

The Leuci-Lawrence tape came about as follows. Leuci had been with the Knapp Commission where he worked

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with Nicholas Scoppetta (later an Assistant United States Attorney), who was at that time one of the Commission's lawyers. In March of 1971, Scoppetta ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. On March 29, 1971, during this investigation, Leuci tape-recorded a conversation with Lawrence, which yielded no information about the homicide, but can be read as suggesting that both Leuci and Lawrence had illegally seized narcotics following arrests and that Lawrence had been permitted to retain some of the narcotics. Scoppetta had listened to this tape in connection with the homicide investigation and had taken it with him when he transferred to the office of the United States Attorney. The tape was not disclosed to the defense prior to the trial and only came to light during the final days of the new trial hearing when Leuci made an inadvertent reference to it.

The District Court found that the Leuci-Lawrence conversation was "neither as unequivocally inculpatory as Rosner claims, nor as exculpatory as the government argues." He found unequivocally, however, that during the course of the conversation "Leuci demonstrates a familiarity with procedures whereby Lawrence could obtain 'packages' of heroin resulting from arrests."

The second instance of governmental suppression alleged by Rosner involves the so-called Goe Memorandum. On July 13, 1972 Leuci was interviewed in the office of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 or 1965 he and three other government agents had conducted a warrantless search for drugs, during which they had come upon and divided equally $200 in cash. This incident was

recorded in what came to be termed the "Goe Memorandum." In early 1971, Leuci had made a separate admission concerning the same event to another DEA agent. Assistant United States Attorney Shaw had learned about the incident shortly thereafter. None of the government prosecutors who participated in the trial was aware of it until April 9, 1974.

[1, 2] In order to accommodate conflicting policy considerations, the standards governing a motion for a new trial based on evidence available to the government before trial vary according to the government's conduct relative to the information. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, "a new trial is warranted if the evidence is merely material or favorable to the defense." United States v. Kahn, 472 F.2d 272, 287 (2 Cir. 1973), cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1973). However, when the government's failure to disclose is inadvertent, a new trial is required only if there is "a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *Id.;* United States v. Miller, 411 F.2d 825, 832 (2 Cir. 1969); see United States v. Keogh, 391 F.2d 138, 147-48 (2 Cir. 1968).

[3] The trial judge, after considering evidence on this point presented at hearing on Rosner's new trial motion, found the government had not deliberately suppressed either the Goe Memorandum or the Leuci-Lawrence tape. He also found that neither piece of evidence was of such high value that it could not have escaped the prosecutor's attention. He pointed out, with respect to

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the Goe Memorandum, that Leuci had admitted on the stand that on four occasions between 1966 and 1968, he had sold information to targets of narcotics investigations, for which activities he had received approximately $6000 in payoffs. In comparison to such activity, Leuci's participation in an illegal entry and a $50 theft was *"de minimis."* The trial judge also concluded that the Leuci-Lawrence tape was ambiguous enough so that its "dubious value could readily have escaped a prsecutor's attention."

These are findings of fact by the judge who had presided at the trial and who had an opportunity to assess the credibility of the witnesses at the hearing. In the circumstances, our review is governed by the principle enunciated in United States v. Johnson, 327 U.S. 106, 111, 66 S.Ct. 464, 90 L.Ed. 562 (1946):

> ". . . it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. [citing cases]. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence [citing cases] it should never do so where it does not clearly appear that the findings the not supported by evidence."

See also United States v. Pfingst, 490 F.2d 262, at 273 n. 11, (2 Cir.), cert. denied, 417 U.S. 919, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974).

We have reviewed the testimony at the hearing and must conclude that the trial court's findings are supported by evidence and are not clearly erroneous. Our further review therefore proceeds under the standard enunciated above to govern situations of inadvertent nondisclosure.

II.

The question presented, then, is whether there is a significant chance that skilled counsel could have developed the evidence of Leuci's criminality contained in the Leuci-Lawrence tape and the Goe Memorandum to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt. We emphasize that the standard demands more than the possibility of a different result upon retrial. Any piece of new evidence might, in theory, alter the course and outcome of a trial, but a case is not automatically remanded whenever such new evidence emerges. An appellate court must weigh whether or not there is in reality a "significant chance" that the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction. United States v. Pfingst, *supra*, 490 F.2d 262 at 277; United States v. Kahn, *supra*, 472 F.2d at 287-89; United States v. Mayersohn, 452 F.2d 521, 526-27 (2 Cir. 1971); United States v. Bonanno, 430 F.2d 1060, 1063-64 (2 Cir.), cert. denied, 400 U.S. 964, 91 S. Ct. 366, 27 L.Ed.2d 384 (1970); United States v. Miller, *supra*.

We are not dealing here with government nondisclosure of direct, exculpatory evidence. Cf. Grant v. Alldredge, 498 F.2d 376, 381 (2 Cir. 1974). Nor are we dealing with perjury and government suppression of information that vitally concerns the motivation of the witness, such as evidence about consideration promised him by the prosecutor for his testimony. Cf. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); United States v. Sperling, 506 F.2d 1323, 1333-34 (2 Cir. 1974); see United States v. Butler, Slip No. 74-2201 (9 Cir. December 18, 1974). In this case there is no

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question of a concealed promise of immunity: Leuci told the jury that he did not expect to go to jail for his crimes.[2]

Nor, finally, are we dealing with a case as unusual as United States v. Miller, *supra*, where the government had inadvertently failed to disclose the fact that the government's primary witness, upon whose identification of the defendant the case depended, had been hypnotized during his earlier interrogation.

The sole issue before us is whether *additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable, admissible only in the court's discretion, might have induced a juror who had no reasonable doubt of Rosner's guilt, to have such doubt. The District Judge, who had

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[2] Appellant argues that a potential witness who is also a potential defendant has a "special motive to lie or fabricate a case" so that he will continue to be of use to the prosecution. The perjury of such a person, Rosner contends, should not be considered merely impeaching but rather as bearing directly on the guilt of the defendant against whom the witness testifies. He cites United States v. Kinnard, 150 U.S.App.D.C. 386, 465 F.2d 566, 57374 (1972), as primary support. The issues in *Kinnard* revolved around the circumstance that the informer-witness was a *narcotics addict* and subject to special instructions to the jury and to extrinsic proof of his addiction. Leuci was not a narcotics addict.

We agree, of course, that a witness who has committed a crime known to a prosecutor has a motive to cooperate with the prosecution. It is this fact which makes perjury concerning bargains made between witness and prosecution so vital. E.g., Giglio v. United States, *supra*. But once the witness has admitted his vulnerability to prosecution which could result in substantial imprisonment and his awareness that he would not be prosecuted, the jury has before it the elements of the defense claim that the witness is committing perjury to save his own skin.

heard the testimony and received other evidence at trial, applying the correct standard, concluded that the additional impeachment information contained in the Leuci-Lawrence tape and the Goe Memorandum would not have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

As we have seen, Leuci's admitted perjury related to his own misconduct, independent of the circumstances of this case, and not to any element of the substantive offenses with which Rosner was charged. Moreover, the prosecution's case rested on far more evidence than simply Leuci's testimony.[3] The *Rosner* case was unusual in that the defendant admitted his technical guilt of the elements of the offenses charged. Cf. United States v. Bonanno, *supra,*

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[3] Appellant argues that the government on the appeal from the conviction relied strongly on the testimony of Leuci, and that this court, in its own opinion, also laid stress on the jury's apparent finding that Leuci was a credible witness. To consider the argument properly, it is necessary to review the contentions on the first appeal. On that appeal, Rosner, having been convicted by a jury after the issue of entrapment had been submitted to it, was forced to argue for an extreme position that the evidence showed entrapment as a *matter of law* and that the case should not have been submitted to the jury at all. The recital of facts by this court on the appeal from the conviction must be read in the light of that contention. 485 F.2d 1213. There was ample evidence from Leuci that rebutted the claim that entrapment had been proved as a *matter of law, and,* accordingly, we took note of it. We did note, however, that Rosner's own credibility would, in any event, still have to be weighed by a jury and could not support dismissal as a matter of law. See United States v. Rosner, *supra,* 485 F.2d at 1222.

In sum, our references to Leuci's testimony were not to sustain the jury verdict, which was not at issue, but in rejection of Rosner's claim that he should have had a directed verdict of acquittal.

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430 F.2d at 1061. The appellant took the stand at the trial and confessed to having paid bribes to a person purportedly employed by the United States Attorney in return for obtaining documents to which he was not entitled, namely, statements of witnesses and grand jury testimony. His sole defense was that he had been entrapped by the Government and the sole support for that defense was his own testimony.

In brief, Rosner contended that the government had sent Leuci out to frighten him with stories that he was being investigated for the murder of Hernandez, a witness in his perjury case, and that he was soon to be remanded to custody. In addition, he claimed that Leuci told him through DeStefano that he was being investigated for fixing a case brought against one Martinez; a grand jury was at the time considering evidence on that "fix" against a bail bondsman named Marcone. These revelations, appellant testified, made him sick and overpowered his judgment so that he succumbed to Leuci's offer to provide him with documents from the United States Attorney's office.

Rosner asserts that the overcoming of his better judgment occurred at the first two meetings between him and Leuci on October 4 and 8. These two meetings, which were also attended by DeStefano and Lamattina, were not tape recorded by Leuci. In basing his entrapment defense solely on the events of these meetings, Rosner put his own credibility on the line for the jury to weigh. He did not call DeStefano or Lamattina as witnesses in his support, perhaps on the assumption that they might not give favorable testimony in the light of their own involvement. He based his defense on his own account of the two meetings.

[4] Rosner's present contention is, in effect, that further evidence tending to impeach Leuci's credibility would have induced a juror to give more credit to Rosner's own testimony in support of his entrapment defense.

It is true that portions of Leuci's testimony contradicted Rosner's account of these two meetings in ways that tended to undermine the entrapment claim and to suggest Rosner's predisposition to commit the offenses charged. For example, Rosner testified that Leuci told him on October 4 that the United States Attorney was investigating Rosner for the disappearance and possible murder of Hernandez. Earlier, Leuci had testified on cross-examination that he might have discussed the witness' disappearance with Rosner on October 4, but did not testify that he told Rosner that the government believed Rosner might have had the man killed.

Leuci also testified that on October 4, Rosner had asked him specifically for 3500 material; Rosner denied asking for anything except whatever information Leuci happened to hear discussed around the United States Attorney's office. Finally, Rosner and Leuci differed as to whether Rosner had bribed Leuci at this first meeting.

With regard to October 8, the major difference between the two men concerns the conversation leading up to Rosner's decision to pay money to Leuci for the information he had supplied. Leuci testified in effect that the only questions were how much and when he would be paid; Rosner testified that he had been browbeaten into paying by DeStefano, Lamattina and Leuci. Leuci testified that Rosner asked him for more information on grand jury witnesses; Rosner denies it. Leuci testified that Rosner

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took with him a copy of the draft indictment against Marcone; Rosner denies taking it.

These conflicts are not insignificant, but it is easy in considering them to overlook the total context of the trial. When Leuci testified, Rosner was not confronted by a witness of assumed moral rectitude whose collapse from virtue might destroy the foundation of the prosecution case. Cf. United States v. Gordon, 246 F. Supp. 522, 525 (D.D.C. 1965) aff'd after remand and new trial, 127 U.S.App.D.C. 343, 383 F.2d 936,938 n.2 (1967), cert. denied, 390 U.S. 1029, 88 S.Ct. 1421, 20 L.Ed.2d 287 (1968). Leuci was a confessedly corrupt policeman, a middleman in bribes and shakedowns, who frankly revealed that he did not expect to be prosecuted for his misdeeds.

Moreover, the jury seems to have viewed Leuci's testimony with skepticism. On the two bribery counts arising from the earlier meetings, where Leuci's word was the only evidence for conviction, the jury acquitted Rosner. While one cannot extrapolate from jury verdicts with mathematical certainty, it is nevertheless significant that Rosner was convicted on counts that were supported by tape recordings and acquitted on those that depended on Leuci's testimony alone. See United States v. Pfingst, *supra*, 490 F.2d at 268, 278.

Finally, the tape recordings of the meetings of October 13, 15 and 19, which were presented to the jury, contain significant evidence that is most damaging to Rosner's defense. The District Judge found that "Leuci was not the linchpin of the government's case; the tapes were." We agree. The tapes reveal not only the fact that Rosner was willing to pay Leuci for transcriptions of grand jury minutes in his subornation case, but also belie his claims

of being browbeaten and of reluctance to participate in the corrupt endeavor. The bargaining disclosed on the tapes was not for information either about a murder investigation or the Marcone-Martinez investigation. It dealt only with evidence in Rosner's then pending subornation of perjury case, about which no threats had been made to Rosner.

The flavor of the tape recordings to which the jury listened can best be conveyed by some quotations from the transcript of the taped meeting of October 13. A discussion of the Hernandez investigation, which Rosner asserts terrorized him into bribery, is conducted in an offhand, cold-blooded manner. Leuci and Rosner had been discussing the fact that the statement of one of the witnesses against Rosner was "missing" when the following exchange occurred:

> Leuci: Alright, alright. Now they've interviewed, they interviewed some guys, some people. I don't know who they are.
>
> Rosner: Right.
>
> Leuci: We would know who they are if they were going to use them, but apparently, it didn't, it didn't work out.
>
> Rosner: I know that. I know they did, and it didn't work out. I know exactly who they interviewed. It didn't work out because there was nothing absolutely nothing. They tried to concoct something from. They got one guy down in West Street now (inaudible 6 seconds). I know who the witness is.
>
> Leuci: You're talking about Pulido.
>
> Rosner: Yeh, they got him. He's in West Street now. Who else do they have to testify? Do they

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have Beltran? Do they have Hernandez? Now they say Hernandez's been clipped. I don't know if he's been clipped. I don't know to tell you the truth. I don't know whether he has been or not I don't. I'd like to know what the hell have they got, do they have anything more than Pulido.

Leuci: These people, these statements that you read, those three people would testify as to what they wrote in the statement.

Rosner: If they use those people, one of those three people, they're supposed to be missing.

What I was told by you, they think that I had this guy hit.

Leuci: No, no, no. They didn't say, you know, our man was clipped.

Rosner: . . . Because I didn't. I don't know. I was relying on what you . . .

Leuci: . . . They're saying, they're saying according to him that they're sure that a guy's been clipped in this, because they just can't find the guy.

Rosner: That must be Hernandez, he seems to be missing

Leuci: That's as simple as that

simultaneous

Rosner: I don't know who the hell is missing. I thought maybe you knew. I don't know.

The transcript indicates that Rosner was interested in acquiring grand jury minutes of the testimony of witnesses against him, but was concerned about two matters: how much he would have to pay; how soon he could get the minutes.

With regard to the amount to be paid, the following exchanges occurred:

> Leuci: I'm not worried about [my contact in the United States Attorney's office] if he makes a commitment to me, whatever, it is, you know, but he knows what he's doing, he's not doing it because he's you know, for love right.
>
> Rosner: . . . right.
>
> Leuci: Understand if he's getting paid to do it, then he'll have to do it. But that's where I am now.
>
> Rosner: What does he have in mind?
>
> DeStefano: Price, that's what we're talking about? I guess you both (inaudible two seconds).
>
> Rosner: What I mean to say is what the [deleted] do you have in mind?

After discussing which witnesses' statements might be available, they return to discussing money. Leuci mentions a price of $4000 or $1500 for the grand jury minutes "which you really don't need." Leuci then agrees to find out if the minutes are available and, at DeStefano's suggestion, guarantees to return their money if he cannot supply them. Rosner comments, "That's good." The following exchange then occurs:

> Leuci: Alright, alright, alright, so listen, I'll put that, I'll put that to him, fifteen hundred dollars for the Grand Jury minutes, and aside from that, more important, a thousand I'm getting, you know.
>
> Rosner: How long will it take him to get them?
>
> Leuci: Well let's find out. Like I said to him, you know . . .

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DeStefano: If we don't get it pronto, then we don't need em.

Rosner: . . . Doesn't do us any good to get it at the last minute.

DeStefano: We don't get it pronto, we don't need it.

Leuci: You're going to get it at the last minute anyway, right?

Rosner: . . . We'll get them as a matter of right anyway. So with us it's just a matter of time, and we're paying a lot of money for nothing.

They finally agree that Leuci will supply the minutes by Friday.

Later on, after some courthouse gossip, the conversation returns to the grand jury minutes. Leuci affirms that he will get them by Friday and the others speculate about whether they should await the trial. Rosner comments:

> The, that's what they're required to do—they don't have to do [deleted]—they go right by the book. The book gives it to you like after the witness testifies you get it but I'd like to know anyway—actually we're ready regardless, but, oh, I'd rather have it. I'd rather be forewarned (inaudible one second).

Thus, casually, Rosner agrees to pay $2500 to bribe a government official for grand jury minutes which he will receive in any case in less than a month.

When appellant joined Leuci and DeStefano at the next meeting on October 15, Leuci greeted him by saying "There is no reason for you to be here." Rosner asks Leuci "Do you think [your contact is] going to come up

with anything?" and Leuci responds: "Easy, apparently there's nothing to it."

They then discuss the availabality of witnesses in the subornation case.

> Rosner: "I know they got one guy for sure, I would like to know about the other two, whether they located them . . ." and "But that guy is one of the three guys, I think,—see if you can get me the details of the other two either they can't locate them or what."

Rosner tells Leuci what to look for. He says:

> "I'd like to know just, ah, who the one is they're having difficulty with—I mean who this guy's,—just what the story is—how" [inaudible two seconds].
>
> Leuci: "I'm sure all that I can find out.
>
> Rosner: And the other thing [inaudible] get all, eh, whatever [inaudible] you can get background on Pulido." [inaudible five seconds].
>
> Leuci: Yeh, all right—you want his yellow sheet?
>
> Rosner: Yeh.

There was a discussion on October 13 concerning whether Leuci could locate information about George Stewart, a defendant whom Rosner represented in a multiple-defendant case and who was suspected of having become a government witness. Leuci testified that DeStefano, not in the presence of Rosner, had asked him to find out whether Stewart, who was under indictment, had become an informant. The substance of this conversation is on the tapes.

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On the October 15 tape, when Rosner joins them, DeStefano brings him up to date: "We're talking about Stewart, Eddie." Leuci says "if he is a real special, top-notch stool, it may not be available so easy." DeStefano says, in the presence of Rosner, "It's worth it, whatever, it is, worth it, I told you that."

When Leuci asks for more background on the matter, Rosner, after hearing the corrupt bargain, volunteers to provide information about his client in order to further Leuci's illegal endeavor: "I can give you all the information. I don't have it right now.' They discuss Stewart further and Rosner supplies information about Stewart's arrest. At the trial, Rosner's first explanation of the Stewart matter was that he thought DeStefano was helping a bondsman locate Stewart as a fugitive. His second explanation, on cross-examination, was that he believed DeStefano was helping the co-defendants get information about Stewart, Rosner's own client.

Beside the easy way Rosner falls in with the corrupt talk of Leuci and DeStefano, the tone of the tapes lends no corroboration to Rosner's story of the tremendous pressures assertedly brought to bear upon him. Since negotiations for the payment of money were ongoing, one would expect to find on the tapes strong pleas for information about the threatened remand, about who the witnesses were on the murder charge and about Rosner's own involvement in the Marcone investigation. Yet there is no question on the tapes by Rosner of where he stands on being remanded, a most likely subject of conversation if he had been told about a probable remand earlier. The tapes show that Rosner himself said that he was not interested in the Marcone situation, a most unlikely statement by a man purportedly "pressured" into criminality by a story that he was being implicated in that very case. Finally, as we

have seen, in the portion of the October 13 tape dealing with Hernandez, the one of the conversations on the tapes is not a frantic, bewildered person falsely accused of murder. There are no direct questions by Rosner of a nature that would support his entrapment defense. How far have they gone in the murder investigation? Whom have they got? Is it serious? Is there anything new about the murder investigation?

The almost complete lack of such talk, the easy nature of the conversation among the participants, the bargaining about money, appellant's eagerness to get the Grand Jury minutes of his pending subornation case, and his participation in corrupt talk about Stewart made the tapes the strongest evidence against the credibility of his story that his mind had been overpowered by the notion of the prosecutor's suspicion that he had had Hernandez killed. In view of the evidence therein presented, it strikes us as highly likely that the shift in the trial equation produced by two additional pieces of impeachment information, one very minor and one ambiguous, aimed at a witness whose character was already tarred, would have been sufficient to change the result. We conclude that these items, no matter how skillfully used by defense counsel, would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped.

III.

Rosner also contends that he is entitled to a new trial because the government knowingly used perjurious testimony, i.e., Leuci's denial of criminal conduct aside from the four episodes to which he admitted on the witness stand. The argument is that although the prosecutors did

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not actually know that Leuci was committing perjury, since Leuci was a part of the prosecution team, his perjury is attributable to the United States Attorney regardless of the actual knowledge of the Assistants who worked on the case.[4] It is true, of course, that Leuci was himself aware of the full extent of his perjury about his past misconduct. We must therefore detail some of the facts that emerged after the trial concerning Leuci's criminal past.

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[4] Rosner also argues that the government had "knowledge" of the perjury because Assistant United States Attorneys Shaw and Scoppetta knew of the existence of the Goe Memorandum and the Lawrence tape, respectively. Attributing their knowledge to the trial prosecutors, Rosner contends that the government should have corrected Leuci's perjury and that its failure to do so warrants granting him a new trial under Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.7d.2d 9 (1957) (per curiam).

This argument discounts completely the finding of Judge Bauman that the prosecutors did not consciously suppress the items and that the items were not of such high value as to stay fixed in their recollection in connection with the Rosner trial. It is certainly true that the knowledge of one prosecutor is attributable to another in a case where a promise has been made to a government witness in consideration for his testimony. Giglio v. United States, *supra*. That is not true where the prosecutor inadvertently fails to recognize the importance of an item suitable for impeachment purposes in relation to a specific trial. To impute knowledge of perjury to the trial prosecutor when even the prosecutor who knew of the document, presumably even if he were sitting in the courtroom, would not have remembered it as contradicting a witness's testimony concerning impeachment matters, would appear to stretch the doctrine too far.

Inadvertent failure to turn over 3500 material is, as we have seen, governed by a less stringent standard than is deliberate failure, and we think, so is *inadvertent* failure to correct a witness' testimony on collateral matters.

In April 1974, Leuci admitted to the United States Attorney that he had performed the following crimes. On fifteen occasions Leuci shared money seized in arrests. He conducted several illegal searches and engaged in illegal electronic surveillance. He distributed small quantities of heroin to his informants for their personal use. He accepted money and narcotics from informants in return for allowing them to continue dealing. He sold information from police investigations to those being investigated. He participated in bribes. He accepted money from attorneys and on one occasion helped to bribe an Assistant District Attorney. He perjured himself in describing *his own* criminal conduct on several occasions, most notably at the Rosner trial.

[5] Perjury by a government witness, unknown to the prosecution, does not ordinarily compel the application of standards for a new trial required in cases of government misconduct. United States v. Marquez, 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2 Cir. 1974); United States v. DeSapio, 435 F.2d 272, 286 n.14 (2 Cir. 1972), cert. denied, 402 U.S. 999, 91 S.Ct. 2170, 29 L.Ed.2d 166 (1971).

Here appellant argues, however, that the "prosecution" had to be fully responsible for Leuci's perjury *as a matter of law* because Leuci himself was part of that "prosecution."

[6] The District Judge rejected the argument, partly on the ground that Leuci was a mere witness to events who did not participate in the strategy of investigation or prosecutorial preparation of the case. We do not agree that Leuci was an ordinary witness. If the thrust of the distinction is that an undercover agent can never be part of the "prosecution" so that the prosecution can be held

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responsible for his coercion of witnesses, his suppression of testimony or his own perjury which vitally affects the trial, we would not agree. But the judge also relied on his finding that the perjury was unrelated to the issues being tried and was related, on the contrary, only to collateral and cumulative impeaching material concerning the witness' own past misconduct.

On that we agree. Appellant has called our attention to no case where an undercover agent committed perjury without the knowledge of the prosecution on a purely collateral matter affecting his own credibility. The cases cited by appellant fail to imply that in such case a new trial would be required. Appellant contends that he is entitled to a new trial under Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1958). While Mazei, the witness in a Smith Act case, was the paid undercover informant, the granting of a new trial did not depend upon his being deemed part of the prosecution team. *Mesarosh* involved that rare situation where a key witness who was accusing people of Communist affiliations had been conceded by the government to have testified against others in a Senate investigation in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind. His suspected perjury, it must be noted, was not with respect to his own past. He was a professional witness who was identifying many persons as directly involved in Communist activities.

Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942) was decided on the allegations of a petition for a writ of habeas corpus which were taken to be true. These allegations were that "the Kansas prosecuting authorities obtained his conviction by the presentation of testimony known to be perjured, and by the suppression

of testimony favorable to him." 317 U.S. at 214, 63 S.Ct. at 178. The record indicates that the coercion of witnesses and the procurement of false testimony favorable to the prosecution was done by the police rather than by the prosecutor. See Curran v. Delaware, 259 F.2d 707, 713 (3 Cir. 1958). The Supreme Court simply remanded for a hearing. But the type of police activity—coercion of witnesses and procurement of false testimony directly involving guilt or innocence as a *Pyle*—is quite different from collateral perjury regarding the witness' own past that is cumulative.

In *Curran, supra*, the perjury committed by the police officer was his testimony that no other statements of the defendants than those admitted in evidence had been taken by the police—a lie the court found may have been "substantial in view of the pivotal issue of consent [in a rape case]." 259 F.2d at 712 (emphasis added).

[7] In Barbee v. Warden, 331 F.2d 842 (4 Cir. 1964), ballistic reports and fingerprint tests tending to show that a revolver different from defendant's own had been used, were deliberately suppressed by the police. Finding that the police reports in question "had substantial evidentiary significance" id. at p. 844, the court held that the lack of the prosecutor's own knowledge about the suppression of evidence did not prevent the ordering of a new trial. We do not doubt that in such circumstances, suppression by the police rather than the prosecutor is enough to warrant a new trial.

Nor is the quality of the collateral perjury here like that in Giglio v. United States, *supra*, where the perjury of the government witness kept from the jury the true story of the consideration promised him by one of the

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prosecutors for his testimony. In cases like *Giglio* a burden is properly placed on government, for it should have known of the consideration promised and have aborted the perjured testimony concerning it at the trial. See also Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

[8] Leuci's past unrevealed criminal misconduct involved no bilateral arrangement to which the government was a party. The prosecution had no way of knowing Leuci's secret past life. Nor did Leuci's perjury involve new evidence vital to an issue directly involving appellant's guilt or innocence.[5]

We think, therefore, that in the circumstances of the case, the circumstances (1) that Leuci was an investigative informant rather than an investigator with authority to arrest in that status, or to direct investigations, (2) that the government could not have known his secret past, (3) that the matters about which he lied did not concern any consideration promised him, and (4) that the perjury involved solely his own misconduct in other situations

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[5] Judge Weinfeld's words in United States v. Marquez, 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2 Cir. 1974), regarding the government's failure to uncover perjury by a witness are equally appropriate here:

> "The government agents can hardly be accused of suppressing information which they did not possess. There is no basis for suggesting, as movant does, that the FBI and the United States Attorney had an obligation to pursue the question of whether [the witness] had in fact [performed the alleged misconduct] and should not have accepted his denials at face value. The issue was totally unrelated to the guilt or innocence of the defendants. . ."

363 F.Supp. at 806.

convince us that his perjury should not be attirbuted to the prosecution, but must be measured by the standards applicable to government witnesses generally.

IV.

Rosner's final argument is that the government suppressed evidence relating to Leuci's credibility on two occasions *after* the trial, and that the proper remedy for such misconduct is an award of a new trial to the defendant.

The first incident occurred in January 1973, a little more than a month after Rosner's conviction. At that time, the United States Attorney's office received word from the New York City Special Narcotics Prosecutor that an informant, Richard Lawrence, had extensive information about official corruption. During subsequent interviews with the United States Attorney's office, Lawrence assterted that he had had extensive illegal narcotics dealings with Leuci. The government agents were unable to locate persons with whom, according to Lawrence, he and Leuci had dealt in narcotics. Lawrence could not provide the names and addresses of these people. He was given a lie detector test by an independent agency and was reported to have failed. At that point, the United States Attorney abandoned the investigation.

Although Rosner's first motion for a new trial was pending before the court and was based on the contention that Leuci had sold drugs to several deponents and had lied about his criminal past at trial, the prosecutor failed to make Lawrence's allegations available to the defense. Judge Bauman denied appellant's first motion.

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[9] We think the United States Attorney's office erred seriously in failing to notify the defense about the Lawrence situation. Appellant is right that the prosecutor should not have made a unilateral determination of the credibility of Lawrence when what Lawrence was alleging fitted into the very pattern of conduct suggested by appellant's motion.

The question is whether there was prejudice to the defendant. The whole Lawrence story was ultimately developed at the subsequent hearing now under review.[6] Since Judge Bauman, after hearing the Lawrence story, decided against the appellant, it is hard to see why the same judge, hearing the same story, would have decided it differently at an earlier time. We have already noted our agreement with Judge Bauman that such testimony was, in any event, cumulative and impeaching. We must conclude that the defendant was not prejudiced by the prosecutor's failure to disclose Lawrence's statements to the defense on the first motion.

[10] The second post-trial contention relates to the Goe Memorandum. As we have seen, Shaw was the only prosecutor who knew of the Goe Memorandum during the Rosner trial. On about April 8, 1974, over a year after trial, it came to the attention of Assistant United States Attorney Sagor of the trial prosecution staff. At that time appellant's petition for certiorari was pending in the Supreme Court and appellant had filed the new trial motion under review. Sagor recognized that the Goe Memorandum was 3500 material and should have been turned over to the defense counsel at the trial. Before a decision

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[6] Rosner did not call Lawrence at the hearing.

could be made about the Goe Memorandum, Leuci on April 17, 1974, disclosed the full range of his past criminal conduct.

The United States Attorney and his staff proceeded to discuss whether in view of the pending certiorari petition, the Supreme Court should be advised of these disclosures. Judge Bauman's findings on the issue were as follows:

On April 30, 1974, John D. Gordan III, the Assistant United States Attorney in charge of appeals, called Andrew Frey of the Solicitor General's office and informed him of the nature of Leuci's perjury at the Rosner trial. The Solicitor General then wrote to the Clerk of the Supreme Court requesting that consideration of the *Rosner* certiorari petition be postponed until a supplemental brief could be filed. Members of the United States Attorney's office reviewed a draft of the brief before the Solicitor General submitted it in mid-May. The brief stated that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matter raised by the defense in an effort to impeach his credibility", but did not review in detail Leuci's recent admissions of criminal conduct.

Appellant argues that the government should have specifically told the Supreme Court of the Goe Memorandum and the circumstances surrounding it as evidence of the government's knowledge of it during trial, as well as the details of Leuci's recent admissions of criminal misconduct.

Assuming that to be true, we are again confronted with the question whether that would have led to a different result. The relief sought by appellant was a hearing

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in the District Court and his motion for that relief was then pending. The Supreme Court, in its denial of certiorari, specifically preserved the new trial motion for hearing on the basis of the Solicitor General's disclosure. 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672. In sum, enough was disclosed to carry appellant's point. The express mention of the Goe Memorandum could not, without a hearing on its background and relevance and, indeed, of the extent of the prosecution's knowledge and recollection of it, result in either a grant of certiorari or a summary grant of a new trial. Appellant got the most he could get from the Leuci revelations, a hearing.

Appellant argues, however, that he would have got more, a summary reversal for a new trial without the need for a hearing on the motion. For this suggestion he relies upon Mesarosh v. United States, *supra*.

It is true that on the strange facts of the *Mesarosh* case, a majority of the court voted for a new trial rather than a hearing, but, as we have seen, the circumstances were materially different. It was the government that moved in the Supreme Court for a hearing in the trial court.

The Supreme Court, in granting a new trial, recognized implicitly that a witness who was practically in the business of falsely accusing others could well have falsely accused the defendant appellants as well.[7] We do not

[7] Appellant cites Williams v. United States, 500 F.2d 105 (9 Cir. 1974) as "dispositive of this appeal." *Williams* was one of a number of appeals from motions denying a new trial in narcotics convictions where five narcotics agents of the Salt Lake City office of the B.N.D.D. had pleaded guilty to violating the civil rights of a narcotics defendant, one Romero, by committing perjury at his trial. United States v. Mendelsohn et al., Crim. No.

[Footnote continued on following page]

believe that the Supreme Court with all the facts now before us would have granted a new trial rather than a hearing to appellant. The Court reminded us in *Mesarosh*, 352 U.S. at 9, 77 S.Ct. at 5.

> "It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the

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4337 C.D. Cal. 1969) (described in United States v. Chisum, 436 F.2d 645, 647-48 (9 Cir. 1971)).

These agents had been key witnesses against narcotics defendants, their respective identifications of the defendant in each case being important to his conviction. Relying on Mesarosh v. United States, *supra*, the Ninth Circuit granted new trials in several cases where it appeared that the perjury of which the agents were themselves convicted as a violation of civil rights were in investigations similar in nature and contemporaneous in time to the investigation of the particular narcotics defendant whose conviction was before the Court. See United States v. Williams, *supra*, 500 F.2d at 108. Convictions were upset in United States v. Chisum, *supra;* United States v. Miramon, 443 F.2d 361 (9 Cir. 1971) (conviction "rests almost entirely on the testimony of Agent Saiz"); United States v. Williams, *supra*.

The *Williams* series is clearly distinguishable on two grounds: 1) The narcotics agents fell into the class of professional purveyors of false charges as in *Mesarosh*; 2) we have carefully reviewed the evidence, as appears in the text, and failed to find in Leuci's testimony anything like the pivotal significance of the narcotics agents' testimony that they had bought narcotics from defendants whom they positively identified.

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often-repeated statement of the courts, an adequate basis for the grant of a new trial." [footnote omitted]

Thus, while appellant's counsel has argued forcefully and well he has been unable to demonstrate any ultimate prejudice to appellant by the government's alleged misconduct.[8]

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[8] After agreement on this opinion by our panel, we found that another panel (Hays and Feinberg, *Circuit* Judges, and Holden, *District Judge*) had filed an opinion in United States v. Seijo and Hildebrandt, 514 F.2d 1357 (2 Cir. 4/23/75). Although counsel for appellant Rosner has not yet had time to call the slip opinion to our notice, we shall consider it *sua sponte*. In the *Seijo* case, it came to the attention of the government after the trial that its witness, Torres, had falsely testified at the trial in stating that he had never been convicted of a criminal offense prior to his arrest in the case at bar. When the United States Attorney called this to the attention of our court, the panel reversed the conviction. As in all cases involving post-conviction developments, cases must largely turn upon their own facts within the principles outlined in our opinion.

As we read the opinion of the panel, the following points emerge:

1. The panel in *Seijo* quite properly began its assessment by stating that "In measuring the impact of the suppressed material, it is important to first consider the strength of the Government's case apart from the evidence given by Torres," at p. 1359.

2. "The essence of the Government's case against both appellants resides in the testimony of Leonard Torres." Id. at1358; see also pp. 1363-64.

3. The connection between Torres and Seijo in relation to the offenses charged against Seijo was wholly uncorrborated.

[Footnote continued on following page]

The order and judgment is affirmed.

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4. Torres, unlike Leuci in the case on appeal, had admitted to no prior misconduct except for a juvenile adventure.

5. Torres, unlike Leuci, had actually been convicted of a crime. His criminal record was not only easily available from the F.B.I. but it actually had been sent to the United States Attorney where it had simply been misfiled. The case was thus one where the government was at fault in not discovering the past criminal record, a situation which concededly did not exist in the *Rosner* case.

The ultimate determination, of course, is whether the appellate court believes that there is a "significant chance" that the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction. See cases cited, *supra*, part II. For the reasons we have given *in extenso*, we do not believe that such a "significant chance" is present here.

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APPENDIX C

Decision of Court of Appeals for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of July one thousand nine hundred and seventy-five.

Docket No. 74-2290

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

EDMUND A. ROSNER, NICHOLAS DESTEFANO, NICHOLAS J. LAMATTINA,

Defendants,

EDMUND ROSNER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Edmund Rosner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

Appendix C—Decision of Court of Appeals for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of July, one thousand nine hundred and seventy-five.

Present: HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN
Circuit Judges.

Docket No. 74-2290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

EDMUND A. ROSNER, NICHOLAS DESTEFANO, NICHOLAS J. LAMATTINA,
Defendants,

EDMUND ROSNER,
Defendant-Appellant.

A petition for a rehearing having ben filed herein by counsel for the Appellant, Edmund Rosner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

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Appendix C—Decision of Court of Appeals for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of August, one thousand nine hundred and seventy-five.

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND ROSNER,

Appellant.

The petition for rehearing was denied by the panel on July 2, 1975. Through error, the denial was not docketed. Thereafter, the panel received two letters dated July 1, 1975 and July 22, 1975 from counsel for appellant and a reply from the United States Attorney dated August 4, 1975.

We have carefully considered this correspondence, and treating appellant's letters as a motion for reconsideration of the decision denying the petition for rehearing, we reaffirm our denial of that petition.

HENRY J. FRIENDLY
WILLIAM H. TIMBERS
MURRAY I. GURFEIN
Circuit Judges

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-492

EDMUND A. ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28a-62a) is reported at 516 F. 2d 269. The opinion of the district court (Pet. App. 1a-27a) denying petitioner's motion for a new trial is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1975. A petition for rehearing was denied on August 6, 1975 (Pet. App. 65a). On Au-

gust 28, 1975, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 29, 1975, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether perjury by a prosecution witness concerning the extent of the witness's own past criminal conduct, but not directly related to the defendant's guilt or innocence, requires a new trial without regard to the materiality of the perjury or its prejudicial effect.

2. Whether a new trial must be ordered because the prosecution inadvertently failed to disclose to the defense two items of information—"one very minor and one ambiguous" (Pet. App. 50a)—that might have been used at trial to impeach the character of a prosecution witness "whose character was already tarred" (*ibid.*), when the district court and the court of appeals found that petitioner was not prejudiced and that there was no significant chance that skilled counsel could have developed the information to the extent that a juror would have been led to a reasonable doubt concerning petitioner's guilt.

3. Whether a new trial must be ordered to penalize the prosecution for alleged post-trial misconduct which both courts below found did not result in any prejudice to petitioner and which the record shows was not deliberate.

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STATEMENT

1. After a jury trial on an eight-count indictment in the United States District Court for the Southern District of New York, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503 and 2 (count 2), three counts of bribery of a public official, in violation of 18 U.S.C. 201(b) and 2 (counts 6 through 8), and conspiracy to commit each of those offenses, in violation of 18 U.S.C. 371 (count 1). After denying motions for a new trial, the district court sentenced petitioner to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing (485 F. 2d 1213). Petitioner was then resentenced to concurrent terms of three years' imprisonment on each count.

On March 20, 1974, while his petition for a writ of certiorari was pending in this Court, petitioner moved in the district court for a new trial on the basis of newly discovered evidence. He alleged that the principal government witness at trial, Detective Robert Leuci, had committed perjury regarding the extent of his past criminal conduct and that the government had had prior knowledge of Leuci's undisclosed criminality.

Nearly one month later, on April 17, 1974, Leuci admitted to the United States Attorney that he had in fact committed numerous criminal acts in addition to those he had admitted at trial. Informed of this

fact by the United States Attorney, the Solicitor General thereafter filed a Supplemental Memorandum in this Court advising the Court that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility" (No. 73-1062, Supplemental Memorandum for the United States, p. 1). On June 10, 1974, the Court denied the petition for a writ of certiorari without prejudice to the district court's consideration of petitioner's motion for a new trial (417 U.S. 950).

In July 1974, the district judge who had presided at petitioner's trial conducted a hearing on petitioner's motion for a new trial. The court thereafter denied the motion (Pet. App. 1a-27a). The court of appeals affirmed (Pet. App. 28a-62a).

2. The facts underlying petitioner's conviction are set forth in some detail in the original opinion of the court of appeals (485 F.2d 1213, 1216-1219) and, insofar as relevant to petitioner's present contentions, in the opinions of both courts below (Pet. App. 2a-4a; Pet. App. 40a-50a).[1] In October 1971, petitioner and Nicholas DeStefano were under indictment in the Southern District of New York. Detective Robert Leuci, acting in an undercover capacity, approached DeStefano and offered, through a supposed contact in

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[1] The facts are also summarized in our brief in opposition to the earlier petition filed by petitioner in this Court (No. 73-1062, pp. 4-10).

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the United States Attorney's Office, to provide information about a grand jury investigation pending in the district. Petitioner later entered into negotiations with Leuci concerning his own pending case and ultimately participated in the payment of several thousand dollars to Leuci in exchange for grand jury minutes and statements of prospective government witnesses ("3500 material"). Five such payments occurred over a period of three weeks, each constituting the basis of a bribery charge in the instant case.

At trial, petitioner's defense was that he had been entrapped by Leuci and other government agents. The government's evidence consisted primarily of Leuci's testimony and tape recordings that he had made of some but not all of his meetings with Rosner.[2] On direct examination, Leuci conceded that he had engaged in four acts of prior criminal conduct; on four separate occasions between 1966 and 1968 he had arranged to sell information gathered by other detectives to persons under criminal investigation, receiving in return approximately $6,000. On cross-examination, Leuci admitted that he did not expect

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[2] "Rosner was acquitted on two of [the bribery] charges relating to payments occurring on October 4th and October 8th [1971] and was convicted of three others which involved payments occurring on October 12, 13 and 19. * * * It is agreed that [Leuci] met Rosner five times. Recordings were made of the meetings on October 13th, 15th and 19th on a tape recorder concealed on the person of Leuci. The earlier meetings of October 4th and 8th were not tape recorded" (Pet. App. 34a).

to be prosecuted for these crimes. He denied additional allegations contained in police department files that he had participated in the illegal transfer of narcotics.

3. At the July 1974 hearing on petitioner's motion for a new trial, Leuci confessed to numerous criminal acts other than those to which he had testified at trial, including the furnishing of narcotics on at least one occasion to an informant, Richard Lawrence.[3] Petitioner's motion was based both on the fact of Leuci's perjury and on the contention that two specific items of newly-discovered evidence—the "Goe memorandum" and the "Leuci-Lawrence tape"—demonstrated at least some pre-trial knowledge by the government of Leuci's belatedly disclosed criminality.

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[3] The district court gave a "brief enumeration" of Leuci's newly-disclosed crimes (Pet. App. 4a-5a; footnotes omitted):

> On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids. Over a period of perhaps three years, he distributed small quantities of heroin to informants. He also took money, and occasionally, heroin, from informants in exchange for letting them continue to sell narcotics. He sold information that had been gleaned from police investigations and acted as an intermediary for other policemen who wished to make similar sales. He participated in illegal electronic surveillance on several occasions. He accepted sums of money from lawyers and, on one occasion, participated in the paying of a bribe to an Assistant District Attorney. He made payments of money to his superior officers in the Police Department. And finally, it is almost supererogatory to add that he committed perjury at the *Rosner* trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers.

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Petitioner further claimed that following his conviction and while he was preparing his first motion for a new trial, the prosecution withheld post-trial allegations by Lawrence that he had often been given narcotics by Leuci. Petitioner also charged that the prosecutors had failed to inform the Solicitor General (and therefore this Court) of the Goe memorandum in connection with the fact of Leuci's perjury.

With respect to the Leuci-Lawrence tape, the district court found (Pet. App. 5a-7a; footnotes omitted):

> Leuci had been with the Knapp Commission, where he developed a rapport with one of the Commission's lawyers, Nicholas Scoppetta. In March of that year Scoppetta ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money. The conversation * * * is neither as unequivocally inculpatory as Rosner claims nor as exculpatory as the government argues. There is no question, however, but that during the course of it Leuci demonstrates a familiarity with procedures whereby Lawrence would ob-

> tain "packages" of heroin resulting from arrests. Leuci told Scoppetta of this conversation and Scoppetta subsequently listened to the tape, which he took with him when he joined the staff of the United States Attorney [in mid-1971]. The tape was, however, not disclosed to the defense prior to trial, and only came to light during the final days of the instant hearing [on the motion for a new trial], when Leuci made an inadvertent reference to it.

With regard to the Goe memorandum, the court found (*id.* at 7a-8a; footnote omitted):

> On July 13, 1972 Leuci was interviewed in the offices of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 and 1965 he had participated in a warrantless search for drugs along with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum". Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. The Goe memorandum, which the government concedes to have been "3500 material", was not turned over to the defense prior to trial. None of the government prosecutors who participated in the *Rosner* trial was aware

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of it until April 9, 1974, when Elliot Sagor, one of the prosecutors, learned of it.

Finally, in regard to Lawrence's post-trial allegations, the court found (*id.* at 21a-22a):

> In late December, 1972 [shortly after petitioner's trial], Lawrence went to the office of Frank Rogers, the Special Assistant District Attorney in charge of narcotics prosecutions in New York City and informed him that he had often been given narcotics by Leuci. Rogers communicated this information to the United States Attorney's Office. Robert Morvillo, then head of the Criminal Division and the government's chief trial lawyer in the *Rosner* case commenced an investigation of those charges on or about January 2, 1973. The investigation was entrusted to Charles Sherman, an agent with the Drug Enforcement Administration. Sherman and a subordinate interviewed Lawrence and were told of the many narcotics transactions in which he claimed to have participated with Leuci. Lawrence mentioned various individuals who were also party to those transactions: one named John, another named Robert, another named "Saint". Lawrence did not know the full names, addresses, or telephone numbers of any of these individuals, and DEA agents were unable to locate any of them in the ensuing weeks with the information he did provide. Lawrence was also given a lie detector test which, according to the concern which administered it, he failed. Morvillo was told of the results of the test on January 18,

> 1973 and decided to abandon any further investigation into Lawrence's allegations during the week of January 21.[4]

Although petitioner's first motion for a new trial was then pending, the prosecutor did not notify the court or the defense of Lawrence's allegations, having concluded that they were groundless.

4. The district court found, with respect to the Goe memorandum, that its nondisclosure was "inadvertent" and that the information it contained was "of no conspicuous value" (Pet. App. 13a). The court determined that "there was certainly no deliberate and carefully considered decision to suppress the information" (*id.* at 11a); moreover, "[t]he $50 incident described in the Goe memorandum" (*id.* at 12a) was of so little significance when viewed against the background of the serious criminal offenses which Leuci admitted at trial that the memorandum could reasonably have escaped even "a diligent prosecutor's attention" (*id.* at 12a).

With respect to the Leuci-Lawrence tape, the court similarly found that there was "no evidence of deliberate, considered suppression" (*id.* at 14a) and that the "dubious value" of the "ambiguous" information on the tape "could readily have escaped a prosecutor's attention" (*id.* at 15a).

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[4] Morvillo also testified that he had been informed by Sherman that Lawrence "was demanding, during this period of time, money in exchange for this information" (A. 564). "A." refers to the appendix in the court of appeals.

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The district court also concluded that petitioner had not been prejudiced by these inadvertent nondisclosures (*id.* at 13a-14a):

> The unstated premise of this motion, in all its facets, is that if the *Rosner* jury had known of Leuci's other criminal activities, whether the Goe incident, the Lawrence conversation, or even the entire panoply of his crimes, his credibility would have been so severely undermined that a different verdict would have been inevitable. I cannot share this view of the evidence or of the jury's perspicacity. The trial was not a simple matching of Leuci's credibility against Rosner's; had it been, the arguments the defendant now advances would have infinitely greater persuasive force. The government's case was based on Leuci's testimony, as corroborated by several tape recordings of conversations in which Leuci and Rosner, among others, participated. Leuci was not the lynchpin of the government's case; the tapes were. * * *
>
> * * * I therefore find that no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected. * * *

The court also rejected petitioner's contention that "the 'massive' nature of Leuci's perjury, in and of itself, requires a new trial" (*id.* at 17a). The court stated (*id.* at 18a, 21a):

> The evidence newly discovered here, regardless of its extent, only serves to impeach Leuci's

> credibility. It does not address the question of defendant's guilt or innocence. * * *
>
> * * * * *
>
> * * * Leuci's credibility was not the crux of the government's case. The jury had before it the very best evidence of Rosner's criminality—the record of his own voice and words and their intonation made in the midst of his criminal activities. Thus, even had the jury been fully apprised of Leuci's criminal background and his credibility diminished accordingly, I see no reasonable likelihood of a different jury verdict. For the tape recordings spoke far more decisively of Rosner's guilt than Leuci did.

With respect to petitioner's claims of post-trial misconduct, the district court found that, while "an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant," the prosecutor here "should * * * have realized that information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion [for a new trial]" (*id.* at 23a). "But even so," the court stated, "I fail to see how it could avail Rosner. The simple fact is that he was in no way prejudiced. All that resulted was the denial of a new trial motion; Rosner has now had another opportunity to move for a new trial, and to include in such motion all of the charges of what the government failed to apprise him in January, 1973" (*ibid.*).

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Similarly, the court could "see no prejudice to Rosner" (*id.* at 25a) from the prosecutors' failure to make specific mention to the Solicitor General of the Goe memorandum. "The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I therefore fail to see how the addition of a single minor item to the list of Leuci's sins could have produced a different result in that Court" (*id.* at 25a-26a).

5. The court of appeals upheld the district court's finding that the prosecution's nondisclosure of the Goe memorandum and the Leuci-Lawrence tape was inadvertent (Pet. App. 37a). It also agreed that there was no "significant chance that skilled counsel could have developed the evidence of Leuci's criminality contained in the Leuci-Lawrence tape and the Goe memorandum to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt" (*id.* at 38a). The court stated (*id.* at 38a-39a; footnote omitted, emphasis in original):

> We are not dealing here with government nondisclosure of direct, exculpatory evidence. * * * Nor are we dealing with perjury and government suppression of information that vitally concerns the motivation of the witness, such as evidence about consideration promised him by the prosecutor for his testimony. * * * In this case there is no question of a concealed promise of immunity: Leuci told the jury that he did not expect to go to jail for his crimes.
>
> * * * * * *

> The sole issue before us is whether *additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable, admissible only in the court's discretion, might have induced a juror who had no reasonable doubt of Rosner's guilt, to have such doubt. * * *

After an exhaustive review of the tape recorded conversations involving petitioner and Leuci, which had been introduced at petitioner's trial (and which the court of appeals panel listened to in the presence of counsel), the panel concluded, as had the district court, that "the tapes [were] the strongest evidence against the credibility of [petitioner's] story" that he had been entrapped (*id.* at 50a). The court of appeals stated (*ibid.*):

> In view of the evidence therein presented, it strikes us as highly unlikely [4a] that the shift in the trial equation produced by two additional pieces of impeachment information, one very minor and one ambiguous, aimed at a witness whose character was already tarred, would have been sufficient to change the result. We conclude that these items, no matter how skillfully used by defense counsel, would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped.

The court of appeals, like the district court, rejected the contention that Leuci's perjury at the trial

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[4a] In the appendix to the petition the word is "likely," but in the court's opinion as filed and published the word is "unlikely" (516 F.2d at 278).

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by itself requires a new trial without regard to prejudice. The court agreed that "the perjury was unrelated to the issues being tried and was related, on the contrary, only to collateral and cumulative impeaching material concerning the witness' own past misconduct" (*id.* at 53a).

The court of appeals also agreed with the district court that "the prosecutor should not have made a unilateral determination of the credibility of Lawrence when what Lawrence was alleging fitted into the very pattern of conduct suggested by [petitioner's] motion [for a new trial]" (*id.* at 57a) but that petitioner was not prejudiced by that post-trial nondisclosure. "Since Judge Bauman, after hearing the Lawrence story, decided against [petitioner], it is hard to see why the same judge, hearing the same story, would have decided it differently at an earlier time" (*ibid.*).

The court assumed *arguendo* that the prosecutors should have informed the Solicitor General specifically of the Goe memorandum at the time of the earlier petition for a writ of certiorari, but it concluded that the omission was not prejudicial to petitioner because it did not affect the result. "The Supreme Court, in its denial of certiorari, specifically preserved the new trial motion for hearing on the basis of the Solicitor General's disclosure. * * * We do not believe that the Supreme Court with all the facts now before us would have granted a new trial rather than a hearing to [petitioner]" (*id.* at 59a-60a).

ARGUMENT

1. Petitioner contends (Pet. 33-35), relying on *Mesarosh* v. *United States*, 352 U.S. 1, that Leuci's perjury at trial concerning the full extent of his past criminal conduct requires a new trial without regard to whether it resulted in prejudice to petitioner. As the court of appeals correctly concluded, however, *Mesarosh* did not establish a general rule requiring a new trial whenever it appears that an important government witness committed perjury, regardless of its materiality to the question of guilt or innocence (Pet. App. 53a):

> *Mesarosh* involved that rare situation where a key witness [in a Smith Act case] who was accusing people of Communist affiliations had been conceded by the government to have testified against others in a Senate investigation in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind. His suspected perjury, it must be noted, was not with respect to his own past. He was a professional witness who was identifying many persons as directly involved in Communist activities.

Here, as the court of appeals found, Leuci's "perjury was unrelated to the issues being tried and was related, on the contrary, only to collateral and cumulative impeaching material concerning the witness' own past misconduct" (*ibid.*). This Court in *Mesarosh* distinguished the situation there from precisely the kind of situation involved here—where a motion

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for a new trial is based on newly discovered evidence which bears on the credibility of a prosecution witness's trial testimony but "which is 'merely cumulative or impeaching'" (352 U.S. at 9). There is no reason here to require a new trial without first considering the materiality of the perjury and the prejudice, if any, to petitioner.

2. Petitioner argues (Pet. 35-43), however, that the court of appeals applied an incorrect standard in assessing the prejudicial impact of Leuci's perjury and of the prosecution's inadvertent nondisclosure of the Goe memorandum and the Leuci-Lawrence tape. The contention rests on an inaccurate characterization of the standard applied by the court of appeals.

Petitioner asserts that the court of appeals required him "to sustain the burden of proving that a juror positively '*would be led* to reasonable doubt about Rosner's guilt'" (Pet. 40; emphasis in original). The test actually used by the court of appeals, however, was "whether there is a *significant chance* that skilled counsel could have developed the [additional] evidence of Leuci's criminality * * * to impeach his credibility to the extent that a juror would be led to reasonable doubt about Rosner's guilt" (Pet. App. 38a; emphasis added). The court did not require proof that "a juror *positively*" would be led to reasonable doubt (Pet. 40; emphasis added). It would have been enough in the court's view if the additional evidence "*might* have induced a juror who had no reasonable doubt of Rosner's guilt, to have such doubt" (Pet. App. 39a; emphasis added).

Petitioner repeatedly stresses (Pet. 36, 37, 38, 40) the court's statement that "the standard demands more than the possibility of a different result upon retrial" (Pet. App. 38a). But he overlooks the sentence immediately following that statement, which explains what the court meant by "possibility" and which drains the clause of the meaning petitioner attributes to it. The court stated: "Any piece of new evidence might, in theory, alter the course and outcome of a trial, but a case is not automatically remanded whenever such new evidence emerges" (*ibid.*).

All that the court intended was that a merely theoretical possibility of a different result, present in every case in which any new evidence is discovered, would not suffice to require a new trial. Only when there is "a *significant* chance" (*ibid.*; emphasis added) of a different result—that is, when the particular facts of the case suggest some reasonable possibility (beyond a purely theoretical possibility) of a different result—is a new trial required. Thus, the standard that petitioner endorses—whether there is a "reasonable possibility" or a "reasonable likelihood" that the jury's verdict might have been affected by Leuci's perjury and the inadvertent nondisclosures (see Pet. 37, 38, 40)—is simply a reformulation of the standard applied by the court of appeals.[5]

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[5]Petitioner argues that the court improperly imposed the burden of proof in this regard on him rather than the government (Pet. 37). Even if the single conclusory phrase on

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In any event, this is not an appropriate case in which to consider the precise formulation of an appropriate standard for determining the prejudicial impact of perjury by a prosecution witness or inadvertent nondisclosure of information by a prosecutor, for petitioner was not prejudiced under any formulation of the test. The district court found—and the court of appeals did not disturb the finding—that "no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected" (Pet. App. 14a; see also *id.* at 17a, 21a).*

Petitioner's contentions reduce, in the end, to an attack on the findings of the district court and the court of appeals. He asserts that "there is at the very

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which petitioner relies has the significance he seeks to give it, however, the court of appeals' decision rests not on a technical allocation of the burden of proof but on the explicit finding, based on a thorough review of the extensive record, that the additional evidence "would not have so altered a juror's perception of Leuci's credibility as to induce reasonable doubt of Rosner's guilt on the basis that he had been entrapped" (Pet. App. 50a). There is no indication that the court would have reached a different result if the burden had been on the government.

* There is consequently no need to hold this petition pending a decision in *United States* v. *Agurs*, No. 75-491, certiorari granted, November 17, 1975. The issue in *Agurs* is whether the prosecution's good faith failure in a murder trial to disclose the prior criminal record of the decedent, in the absence of a defense request for the information, constitutes a deprivation of due process and requires a new trial if, as the *Agurs* panel concluded, "the undisclosed evidence * * * '*might* have led the jury to entertain a reasonable doubt about

least a 'reasonable likelihood' that some of the jurors would have been influenced by the destruction of Leuci's credibility and that disclosure to the jury of the truth about Leuci '*could* . . . have affected the judgment of the jury' " (Pet. 40; emphasis in original). That factual issue was resolved against petitioner by both courts below after exhaustive evidentiary inquiry. There is no need for further review.

3. Petitioner contends (Pet. 24-32) that a new trial should be ordered because of what he calls the prosecution's "deliberate post-trial misconduct" (Pet. 24) in failing to disclose to the district court the substance of the Lawrence allegations and failing to apprise the Solicitor General specifically of the Goe memorandum and the Leuci-Lawrence tape. Petitioner does not challenge the findings of both courts below that he was in no way prejudiced by the alleged "misconduct." He argues instead that a new trial should be ordered solely to penalize the prosecution.

a. Petitioner's imputation of deliberate misconduct to the prosecutors is supported neither by the findings

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appellant's guilt' " (*Agurs* Pet. App. 11a; emphasis added). Although our petition in *Agurs* suggested (p. 13) that the court's application of a reduced standard of materiality in the absence of prosecutorial misconduct conflicted with (among other decisions) the decision of the court of appeals in the present case, the finding of the district court here—that "the jury's verdict could not possibly have been affected" (Pet. App. 14a)—would satisfy even the standard applied by the District of Columbia Circuit in that case. Thus, even if this Court were to uphold the decision of the court of appeals in *Agurs*, that would not affect the proper disposition of the present petition. (We have sent petitioner's counsel a copy of our petition for a writ of certiorari in *Agurs*.)

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below nor by the evidence. The court of appeals concluded that the prosecution had "erred seriously" in making "a unilateral determination of the credibility of Lawrence" and in failing to recognize that Lawrence's allegations, whatever their merit, might have been useful to the defense in its first motion for a new trial (Pet. App. 57a; see also *id.* at 23a). But to say that the prosecutor made a serious error of judgment does not imply that he deliberately and in bad faith withheld information that he believed was material. To the contrary, the evidence is wholly inconsistent with any such claim.

Confronted with Lawrence's allegations, the prosecutor took steps to attempt to verify them, directing agents to investigate the leads provided by Lawrence and obtaining Lawrence's consent to taking a polygraph test. The investigation failed to substantiate the allegations, and the results of the polygraph test indicated that Lawrence was lying. The prosecutor thereafter abandoned the investigation, having concluded that the allegations were baseless (A. 564-565, 574). He testified that he did not understand there to be any legal obligation to reveal to the defense the substance of the meritless allegations (A. 563-566, 569-571, 588, 590, 596-597). Cf. *Moore* v. *Illinois*, 408 U.S. 786, 795; *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (C.A. 2). Whether or not he was correct in that judgment, there is nothing to suggest that it was a "calculated" (Pet. 25) decision to suppress material information.[7]

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[7] Petitioner belittles the prosecutor's investigation (Pet. 15-16). While the district court found it unnecessary to con-

b. Even less did the prosecutors deliberately withhold evidence from this Court that they had reason to believe "could have affected the outcome of the [certiorari] petition" (Pet. 24). They did not become aware of the Goe memorandum until April 1974, when petitioner's application for certiorari and his new trial motion were both pending. Assistant United States Attorney Sagor realized that the memorandum was "3500 material" that should have been turned over to the defense at trial; he advised chief appellate attorney Gordan of the memorandum and of his intent to give it to the defense in connection with the new trial motion (A. 1090). At about the same time, Sagor learned of the Leuci-Lawrence tape, in which "Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain 'packages' of heroin resulting from arrests" (Pet. App. 7a) but which leaves unclear whether Leuci had given drugs to Lawrence. A transcript of the tape was prepared

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sider the adequacy of the investigation, it noted that "an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant" (Pet. App. 23a). Moreover, petitioner's "failure to call Lawrence to testify scarcely bespeaks unbounded confidence in the quality of his testimony. It also tends to undermine the defense contention that Lawrence's information was of such singular value that the government prosecutors should have investigated it more thoroughly" (*id.* at 24a). Indeed, since petitioner offered no evidence either to support Lawrence's allegations that Leuci had engaged in narcotics transactions or to substantiate the value of any of the "leads" provided by Lawrence to the investigators, there is nothing in the record to contradict Leuci's testimony (A. 393, 499) that Lawrence's allegations were fabricated.

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specifically with a view to rebutting Lawrence's anticipated testimony at the new trial hearing that Leuci had been giving him large quantities of drugs at about the time of the taped transaction (A. 1253-1254). Within a week, however, both the memorandum and the tape were dwarfed in significance by Leuci's revelations of perjury and large-scale prior misconduct. The United States Attorney thereupon informed the district court that *Leuci* had admitted to additional misconduct. Gordan shortly thereafter notified the Solicitor General's office, and the Solicitor General informed this Court, of the fact and nature of Leuci's perjury.

Petitioner's claim (Pet. 22-23) that the prosecutors deliberately misled the Solicitor General—and thereby this Court—by notifying him of Leuci's perjury but withholding mention of the Goe memorandum and Leuci-Lawrence tape (both assertedly indicating government pretrial "aware[ness] of some of Leuci's undisclosed criminality" (Pet. 22)) is groundless.[8] Gordan testified that he never thought "about the Goe memorandum in connection with any communications with the Solicitor General with regard

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[8] Contrary to petitioner's suggestion (Pet. 24), the court of appeals "assumed" only for the sake of argument that the prosecutors "should have specifically told the Supreme Court of the Goe Memorandum and the circumstances surrounding it as evidence of the government's knowledge of it during trial" (Pet. App. 58a). Indeed, the court used the quoted language merely in reciting petitioner's contention. Petitioner did not contend in either court below that the prosecution should have notified this Court specifically of the Leuci-Lawrence tape (see Pet. App. 24a; Pet. App. 57a).

to Leuci's [admissions]" (A. 1087-1088). He had regarded Leuci's 1964 appropriation of $50 as of "little significance" compared to Leuci's other confessed crimes (A. 1067). Indeed, Leuci maintained even after his confession of perjury that he had merely forgotten the Goe incident at trial (A. 1048). As for the Leuci-Lawrence tape, the prosecutors did not believe that it evidenced government pretrial knowledge of criminal conduct specifically involving Leuci, a belief that the courts below later found justified (see Pet. App. 15a, 16a, 51a, n. 4).

Thus, the prosecutors concluded that their duty was to notify this Court of the central fact that the government's principal witness had committed perjury at trial in matters affecting his credibility. They saw no reason at the time to apprise the Solicitor General specifically of the Goe memorandum and Leuci-Lawrence tape. In light of Leuci's admission to the prosecutors that he had engaged in numerous acts of criminal misconduct other than those to which he had testified at trial, the information on the memorandum and the tape must have seemed then, as it does now, to be of little additional significance. Those items were to be presented to the district court in connection with petitioner's pending motion for a new trial, and that court was plainly the proper forum to consider in the first instance whether and to what extent those items were relevant to petitioner's motion.

In any event, if there was fault in the prosecutors' failing to apprise this office of those two items, it

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was one of judgment, not of motive. There is simply no foundation for petitioner's assertion that the prosecutors "made a series of premeditated and strategic decisions * * * intentionally to withhold undeniably relevant information from the courts" (Pet. 29).[9]

c. It follows that the premise of petitioner's contention—that "deliberate post-trial misconduct" (Pet. 24) requires a new trial even if the defendant suffers no prejudice—is inaccurate. Even if deliberate prosecutorial misconduct would warrant a new trial

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[9] Petitioner contends (Pet. 30-31, n. **) that additional evidence that came into his possession only after the denial of his latest new trial motion establishes that the prosecutors "had actual pre-trial knowledge of Leuci's participation in yet another serious crime which was not reve[al]ed at either the trial or the instant new trial hearing" (Pet. 31, n. **), namely, an illegal electronic surveillance in 1971. Petitioner presented this contention to the court of appeals by letter during the pendency of his appeal. The government submitted a reply supported by affidavits which stated that, contrary to petitioner's present assertion, petitioner's counsel knew of the substance of Leuci's involvement in the electronic surveillance before the new trial hearing and could have presented the matter to the district court for specific findings of fact. The government also submitted that the act in question involved Leuci's gathering of evidence with the knowledge of the government as part of an investigation of illegal activity by other police officers. The court of appeals treated petitioner's newest submission as a motion for reconsideration of its decision denying him rehearing, and it denied the motion (Pet. App. 65a).

irrespective of prejudice,[10] there was no such misconduct in this case.

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[10] Petitioner argues that granting a new trial is the only "effective remedy for deliberate post-trial misconduct by government attorneys" (Pet. 24) and that a failure to order a new trial in such circumstances would mean that "there can *never* be any remedy for post-trial suppressions, regardless of how deliberate or serious they may be" (*ibid.*; emphasis in original). If a prosecutor engages in deliberate misconduct, however, he may be subject to professional disciplinary proceedings. See American Bar Association, *Code of Professional Responsibility*, Disciplinary Rule 7-102 (1971). We question the appropriateness of granting a new trial, in the absence of prejudice to the defendant, solely to penalize the prosecutor, for it is less the prosecutor than the criminal justice system and the public that would suffer the penalty. We do not see the wisdom in fashioning so drastic a "remedy" to correct a wrong not affecting the defendant's right to a fair trial.

United States v. *Ott*, 489 F. 2d 872 (C.A. 7), on which petitioner relies, does not support his contention. The court there reversed a conviction and remanded for a new trial upon a finding of deliberate prosecutorial misconduct at trial as well as on appeal. The defendant at trial sought by cross-examination to show that a principal prosecution witness was a government informer. The prosecutor objected to the questions, denied that the witness was a government informer, and offered to present evidence to support his denial. The trial court sustained the prosecutor's objection. The witness was in fact a government informer. The court of appeals found that, although appellate counsel for the government knew that trial counsel had misled the trial court, he failed to disclose that fact to the court or to defense counsel except in response to questions at oral argument. The court of appeals viewed as "deliberate the prosecutor's misstatement, his offer to produce inaccurate testimony, and his failure to correct his own misrepresentation" (489 F. 2d at 875; footnote omitted).

Petitioner says that the court in *Ott* reversed the conviction "despite the conceded fact that the defendant had not

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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DECEMBER 1975.

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been specifically prejudiced by the suppression" (Pet. 26). But, while the court agreed that "proof that [the witness] was an informant would not have been sufficient to demonstrate [the defendant's claim of] entrapment" (489 F. 2d at 875, n. 6), it nevertheless found that the defendant may have been prejudiced. The court stated: "[I]f defendant had obtained a favorable ruling in connection with the dispute over [the witness's] status, he might have elected to testify and we have no way of evaluating the strength of the entrapment defense which might have been supported by that testimony buttressed by a correct description of [the witness's] relationship to the government" (*ibid.*).

Ott thus does not stand for the proposition for which petitioner cites it, and the decision does not conflict with the present case. Not only is there no finding here of deliberate prosecutorial misconduct, but also both courts below found that petitioner was not prejudiced by the alleged "suppression" of information.

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SUPREME COURT

FILED

DEC 30 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-492

EDMUND A. ROSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-492

EDMUND A. ROSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

On November 17, 1975, the Solicitor General requested an extension to December 17, 1975 to file the Government's response. The Court extended the time "but only to and including December 3, 1975." Subsequently another extension—to December 17, 1975—was sought and obtained. Petitioner's counsel received mail service of the Government's brief on Saturday, December 27, 1975. Prior to that date, petitioner's counsel had learned from the Clerk's office that this case was set for conference on January 9th and that the petition—and now presumably the Government's brief in opposition—would be distributed before the beginning of the week of December 29, 1975. Time constraints, caused by the Government's late filing, require petitioner to limit his reply to correcting only the most egregious errors in the Government's brief.

The Government's Conduct Before This Court

Petitioner's major point before this Court is that the United States Attorney's Office withheld critical information from this Court and misrepresented the state of the record to this Court on the prior petition for certiorari. The critical withheld information was that two Assistant United States Attorneys responsible for § 3500 material at the *Rosner* trial had knowledge prior to the trial of the existence of the Goe memorandum (disclosing a specific crime that Leuci did not admit at the *Rosner* trial) and of the Leuci-Lawrence tape (disclosing Leuci's familiarity with narcotics crimes of the type that Leuci had denied at the *Rosner* trial). The misrepresentation was that the United States Attorney affirmatively represented to this Court that the *Rosner* prosecutors had no knowledge—prior to or during the *Rosner* trial—indicating that Leuci's testimony was false. This representation was clearly misleading since the United States Attorney's Office knew when it made that statement that two Assistant United States Attorneys in that Office—who, the District Court found, "were given primary responsibility for gathering and disclosing to the defense all § 3500 material"—did have knowledge *before and during the Rosner trial* that Leuci had committed additional crimes.

The Solicitor General now argues that the fact that two Assistant United States Attorneys had information about additional Leuci crimes *pre-trial* is "of little additional significance" (Government's Brief in Opposition at 24). But under the governing case law, the question of when the Government possessed information indicating that its witness' testimony was false is extremely significant. The Government itself was aware of the importance of when such knowledge was obtained; it went out of its way to represent to this Court that the prosecutors had no *pre-trial* knowledge indicating that Leuci's testi-

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mony was false.[1] The Government simply cannot have it both ways. Moreover, the record establishes that John Gordon—the Assistant United States Attorney in charge of the Appeals Section—specifically informed the United States Attorney for the Southern District of New York that "the Government's knowledge" at the time of the trial was "a critical factor" in determining whether a new trial would have to be granted. (H. Tr. at 732).

Finally, the Solicitor Genereal argues that "if there was fault in the prosecutor's failing to apprise this office of those two items, it was one of judgment, not of motive." (B. O. at 24-25). There was no such finding of fact made in either opinion below. Moreover, the Solicitor General's overly generous characterization of the prosecutor's actions before this Court entirely neglects the affirmative misrepresentation involved in informing this Court as well as the District Court that the prosecutors had no pre-trial knowledge "in connection with false testimony by Leuci." It is one thing to characterize an *omission* as inadvertent, but it is quite another thing to characterize an affirmative misrepresentation as something less than deliberate.

Moreover, the Government neglects to mention that the original decision made by the United States Attorney's

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[1] The Government's opposition to Rosner's prior petition for certiorari specifically stated: "It [the determination whether a new trial should be granted by the trial judge] should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegations, *which the United States Attorney denies*, and *which is potentially critical to the disposition of the new trial motion*, that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci." (at 10) (Emphasis added). Moreover, the record establishes that Assistant United States Attorney Sagor made a handwritten insertion in the Telex draft of the Government's brief emphasizing that misleading representation. (See Pet. at 22).

Office was to keep from the Court on the prior certiorari petition *even the fact that Leuci had committed perjury at the Rosner trial.* (H. Tr. at 763, 767, 769). Only public disclosure by the press led the United States Attorney's Office to change its position. And even then it failed to disclose to this Court all it knew. The record in this case plainly establishes that the United States Attorney's Office made a series of premeditated and strategic decisions to withhold relevant information from the courts and they affirmatively misrepresented the state of their pre-trial knowledge to this Court.

Petitioner has now raised this serious charge before three courts. Both the District Court and the Court of Appeals declined to pass on it, holding that even if true, they would not grant the relief sought. The Solicitor General argues that the charge is not true. In light of the lower courts' refusals to pass on the merits of this charge, this Court cannot accept the Solicitor General's self-serving contentions without a full review on the merits. Unless this Court grants review in this case, a serious and unresolved cloud will continue to hang over the performance of an important United States Attorneys Office before this Court. One would have expected the Government to urge review by this Court if for no other reason than to clear the air of this serious charge. Their failure to do so necessarily raises the suspicion that the Government fears that a full hearing on this issue will not support its contention.

The Solicitor General—in a fallback position—argues that even if the charge is true, a new trial should not be granted in the absence of prejudice to the defendant. (B. O. at 26, N. 10). "For it is less the prosecutor than the criminal justice system and the public that would suffer the penalty.". This argument—made in all cases involving prophylactic reversals—raises a significant issue of policy that should be considered by this Court on the merits.

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The Government's Conduct Before The Lower Courts

The Government makes two arguments in rebuttal to the petitioner's claim that the Court of Appeals erroneously failed to apply the standard established by this Court—that "a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury' " *Giglio* v. *United States*, 405 U.S. 150, 154 (1971), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). The Government asserts first that petitioner's "contention rests on an inaccurate characterization of the standard applied by the court of appeals" (B. O. at 17), and second that it is merely "an attack on the findings of the district court and court of appeals" not on the application of a legal standard (B. O. at 19). Both arguments seriously distort petitioner's position before this Court.

The Government rests its argument that petitioner inaccurately characterized the standard employed below on petitioner's quotation of the lower court's statement that "the standard demands more than the possibility of a different result upon retrial," and its requirement that a juror "*would be led* to reasonable doubt about Rosner's guilt." (B. O. at 17, emphasis in Petition). The Government does not assert that the Court of Appeals *not* make these statements, merely that it did not mean them in the way that petitioner would have this Court read them. In support of this assertion, the Government quotes one particular sentence as embodying "[t]he test actually used by the Court of Appeals":

> whether there is a *significant chance* that skilled counsel could have developed the [additional] evidence of Leuci's criminality . . . to impeach his credibility to the extent that a juror would be led to a reasonable doubt about Rosner's guilt." (B. O. at 17, emphasis by Government.)

Having underscored the words "significant chance", the Government argues that by use of that phrase, the lower court means that a new trial would be required "when the particular facts of the case suggest[ed] some reasonable possibility (beyond the purely theoretical possibility) of a different result," and that therefore the lower court actually applied the very same "could" standard as is articulated in *Giglio*.

But the Government's interpretation of the phrase "significant chance", wrenched from its context, is deceptive; it detracts attention from other phrases and sentences used by the Court of Appeals which leave no doubt that that Court did *not* perceive itself as applying a "could" standard. In the very same sentence in which the Government finds the phrase "significant chance", the court wrote:

> An Appellate Court must weigh whether or not there is in reality a "significant chance" that the disclosure *would have* induced a reasonable doubt in the minds of enough jurors to prevent a conviction. (Pet. App. at 38a, emphasis added).

While the Court of Appeals paid lip service to phrases reminiscent of the *Giglio* test,[2] when it came to its bottom-line decision denying that petitioner was entitled to a new trial, it specifically relied on the "would" formulation of the test:

> In view of the evidence therein presented, it strikes us as highly unlikely that the shift in the trial equation produced by two additional pieces of impeachment information . . . *would have been* sufficient to change the result. We conclude that these

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[2] Thus, for example, the lower court at one point used the phrase, "might have induced a juror who had no reasonable doubt of Rosner's guilt to have such doubt." (Pet. App. 39a), which the Government seizes on out of context to attempt to prove its point.

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> items, no matter how skillfully used by defense counsel, *would not have so altered* a juror's perception of Leuci's credibility as to induce a reasonable doubt of Rosner's guilt on the basis that he had been entrapped. (Pet. at 50a).

In light of these plain and unambiguous statements by the court—and despite the Government's present claim to the contrary—it is clear that the petitioner in this case was held to a much higher burden of proof than that contemplated by the *Giglio test*:—*an assertion that an event WOULD occur plainly requires greater certainty than an assertion that it COULD occur.*

Moreover, in its petition for certiorari in another case, *United States* v. *Agurs*, 75-491, the Government virtually conceded that the Second Circuit applied a more stringent standard in this case than that suggested by the "could" test. In *Agurs*, the District of Columbia Circuit had formulated the relevant test as requiring that "the undisclosed evidence . . . *might* have led the jury to entertain a reasonable doubt about appellant's guilt." (*Agurs* Pet. App. at 11a, emphasis added). To support his application for certiorari, the Solicitor General specifically argued that there was a conflict between the "relaxed" standard applied by that court and the standard applied by the Court of Appeals in this case.

Having had certiorari granted in *Agurs*, the Solicitor General now conveniently argues that there really is no conflict between the two cases, and that the conviction in this case would have to be affirmed even under the *Agurs* standard. Surely, the Government should not be allowed to have it both ways.[3] But in any event, petitioner

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[3] In *Agurs* the Solicitor General argues that the sine qua non of a *Brady* violation is a meaningful defense production request for the suppressed material. In this case there can be no dispute that such a request was repeatedly conveyed to the prosecution. (See Pet. at 7-8).

vigorously disputes the Government's conclusory allegation that the result in this case would have been unaltered under the *Agurs* test. Notwithstanding the Government's undocumented assertion that "petitioner was not prejudiced under any formulation of the test", on the face of the record of this case (briefly summarized at pp. 41-42 of Pet.), it is patently unreasonable to maintain that the total destruction of Leuci's credibility *could not* in "any reasonable likelihood have affected the judgment" of even one single juror. Nor is this assertion merely an "attack upon the findings of the district court and the court of appeals" as the Government claims; rather it is an assertion that in both lower courts the petitioner was refused a new trial by application of a standard directly in conflict with those applied by this Court and by several other circuits. On December 18, 1975, the Third Circuit decided *United States* v. *McCrane* (75-1643) in a manner so as to create a direct conflict between that decision and the instant case. In *McCrane*, the Court held that a new trial must be granted if "the absence of [the withheld] impeachment matter . . . tends to impair seriously the reliability of the only witness whose testimony carries the case to the jury." (Slip Op. at p. 9). The Court in that case explicitly applied a "might" rather than a "would" standard, ("we cannot exclude the other inference . . . that at least some of the jurors might have felt . . ."). The Court explicitly rejected the "would" test and adopted instead the "could" standard: "It is difficult to predict the reaction of the jury if at that point the letters written by the United States Attorney's Office had been brought to their attention. The letters perhaps might have had no effect; but undeniably they could have shown that the witness . . . was in fact cooperative and financial self-interest was

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involved." (Id. at 10). Thus, yet another Circuit is in conflict with the standard relied on by the court below.[4]

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[4] Several misstatements in the Government's brief require correction:

1) The Government argues that petitioner's failure to call Lawrence as a witness at the new trial hearing "tends to undermine the defense contention that Lawrence's information was of such singular value that the Government prosecutors should have investigated it more thoroughly" (B. O. at 22, N. 7). The Government fails to comprehend the critical distinction between the Lawrence information *before* Leuci's recantation and *after* it. Before it, Lawrence was the sole source of information that Leuci was a fulltime major criminal and had perjured himself at Rosner's trial. After Leuci's recantation, Leuci became the best evidence of that now undisputed fact. It would have been redundant in the extreme for petitioner to call Lawrence to corroborate Leuci's admissions that he did indeed engage in numerous illegal drug transactions.

2) The Government alleges that its investigation of the leads provided by Lawrence was adequate (B. O. at 21). Neither court below found that to be the case. Indeed the record clearly establishes that the investigation and the polygraph test were total shams. (See Pet. at 15-17).

3) Finally, petitioner contends that new information has recently come to attention regarding additional crimes about which the Government knew pre-trial. The Government argues that a) the petitioner knew of these crimes prior to the hearing; and b) that they were not really crimes since the illegal wiretaps were installed "with the knowledge of the government". Petitioner denies that he had actual knowledge of these crimes prior to the hearing. Moreover, the record reveals that the prosecutors who knew of these additional Leuci crimes before the *Rosner* trial certainly regarded them as real crimes; indeed they contemplated prosecuting Leuci for them. (Pet. at 30, 31, N. **). Surely, it cannot seriously be argued today that a prosecutor's approval of an illegal wiretap—if there was such approval here—converts an illegal act to a lawful one. See *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D. D. C. 1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

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